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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 548

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

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OCTOBER TERM, 1954

No.

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners, Eugene Smaldone and Clyde Smaldone, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on November 2, 1954.

OPINIONS BELOW

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Tenth Circuit, printed as Appendix A hereto and appearing at p. 1 of the Joint Appendix* unreported.

JURISDICTION

The judgments of the Court of Appeals for the Tenth Circuit were entered on November 2, 1954 (App. B, Joint Appendix, p. 27). Rehearing was denied on November 16, 1954 (App. C, Joint Appendix, p. 31), and Justice Clark

* All Appendices to this Petition are contained in the Joint Appendix to Petitions for Writ of Certiorari, which Joint Appendix also accompanies the Petition in No. 538, *William Calvaresi* and *Jerry Benallo, Jr.*, v. *United States*.

extended the time within which to file Petition for Writ of Certiorari to and including January 15, 1955 (App. D, Joint Appendix, p. 32). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals upheld an indictment charging Petitioners with conspiracy to tamper with a jury only because the "gist of the offense charged is the unlawful agreement and * * * how many or which jurors were to be contacted was not part of the offense of conspiracy" (App. A, Joint Appendix, p. 8); but observed: "What individual jurors, or how many, or what friends of prospective jurors they undertook to contact would become *material* only when they went to trial for the substantive offenses". (Id. at 8-9) (emphasis added).

What the Court overlooked was the fact that Petitioners *had gone* to trial for the substantive offenses and the indictments charging the substantive offenses did not contain the names of the jurors, friends of jurors, or prospective jurors whom the Petitioners undertook to contact; that the convictions for these substantive offenses were then before the Court for review; and that the Court had in fact sustained those very indictments and the convictions based upon them.

Moreover, bills of particulars requesting the names of jurors, friends of jurors, and prospective jurors, had been denied by the trial court (R. 92, 106, 122-4), and the Court below sustained this denial (App. A, Joint Appendix, pp. 11-12).

The question thus presented is: Where a court, in sustaining a conspiracy indictment, has held that the names of the persons whom the Petitioners sought to contact are *material* to indictments charging substantive offenses, and the substantive indictments upon which Petitioners were convicted did not contain this information, and bills of particulars requesting this information had been denied, may the said convictions stand?

2. Where Petitioners were convicted in a trial in which they were tried simultaneously on three indictments, one charging conspiracy and two charging the substantive offenses growing out of the conspiracy—and the conspiracy indictment has been held by the reviewing court to be inapplicable to them because it placed them in double jeopardy—may the convictions under the substantive indictments be permitted to stand where the evidence on the substantive offenses was completely intermingled and indistinguishable from the evidence on the conspiracy?

3. Where an Affidavit and Motion for change of judge (for bias and prejudice) has been filed pursuant to 28 U.S.C. Section 144, and the trial judge refuses to disqualify himself, should the appellate Court restrict itself to reviewing the legal sufficiently of the Affidavit and Motion, or should it examine the record of the entire proceeding to determine whether the trial judge was biased and prejudiced? And if so, what is the test for reversal?

4. The district in which the trial was to be held had been saturated in the weeks immediately preceding trial with publicity unfavorable to Petitioners in newspapers, radio and television. (R. 52; Original Exhibit A, Case No. 13800, on file with the Clerk).

Some of this unfavorable publicity originated from the trial judge (R. 12-13).

Moreover, the trial judge recognized the extent to which the portending trial had been publicized (R. 44, 208-9).

A timely motion for transfer to another district (R. 93, 105, 132) was denied (R. 96, 107, 135).

Thereafter, in the selection of the jury, 22 prospective jurors were dismissed by the Court for prejudice (R. 244 *et seq.*).

The question presented is: Under these circumstances was the right of the Petitioners to a fair trial safeguarded, or should their motion for transfer to another district have been granted?

5. Where a conspiracy has been characterized by the Courts and the Government as one scheme, and where in the execution of this scheme two penal statutes are violated, may the conspirators be penalized twice, or is their punishment limited to "the single penalty" as this Court held in *Braverman* v. *United States*, 317 U. S. 49?

6. Does the phrase "juror * * * authorized * * * to hear or determine any question, matter, cause, proceeding, or controversy", as used in 18 U.S.C. Sec. 206, mean a person who is merely a member of a jury panel and at best a prospective juror, or does it mean only a person who has been sworn and selected to sit on a particular jury to determine a specific case?[1]

7. Where the judge before whom a guilty plea has been entered is not shown to be "by reason of absence from the district, death, sickness or other disability * * * unable to perform the duties to be performed by the Court after a verdict or finding of guilt", may another judge impose sentence, or does such a procedure violate Rule 25, Federal Rules of Criminal Procedure?

8. Where the trial court fails to afford the defendant an opportunity to make a statement before being sentenced, must the judgment be reversed because of the requirement of Rule 32(a), Federal Rules of Criminal Procedure, that "Before imposing sentence the court *shall* afford the defendant an opportunity to make a statement on his own behalf . . ."?

9. If the points raised under Questions 2, 3, 4, 7 and 8, *supra*, do not, when considered separately, indicate a denial of due process, do they not, when considered together, so taint a proceeding in their cumulative effect as to require that Petitioners be afforded a new trial?

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[1] This same question would apply to the phrase "any grand or petit juror * * * in the discharge of his duty" as used in 18 U.S.C. Sec. 1503, and this point may also be raised if certiorari is granted.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The various constitutional and statutory provisions and the Rules of the Federal Rules of Criminal Procedure involved in this case are set out in Appendix E, Joint Appendix, p. 33.

STATEMENT

This case involves the trial of Petitioners, along with other defendants (including Petitioners William Calvaresi and Jerry Benallo, Jr., in No. 538, October Term, 1954), on a series of indictments charging violations of Title 18 U.S.C. Sections 206 and 1503—offering bribes to jurors, and impeding the administration of justice—and also conspiracies to do these forbidden acts in violation of 18 U.S.C. Section 371. (See Indictments, R. 85, 102, 112, 148). These alleged efforts and conspiracies centered about the trial of Petitioner Eugene Smaldone on a tax evasion charge which began in June 1953 and ended in a mistrial; and which was scheduled for retrial on September 21, 1953. (R. 112-113, 149).

A. The Indictments

Beginning on September 21, 1953, a series of indictments were returned against Petitioners charging either substantive offenses or conspiracies. This Petition is concerned primarily with the indictments and proceedings in Cases Numbered 13794, 13795, 13800 and 13833. Case No. 13794 (R. 85) charged Petitioner Eugene Smaldone in sixteen counts with offering bribes to jurors and obstructing due administration of justice. Case No. 13795 (R. 102) charged Petitioner Clyde Smaldone in six counts with similar offenses. Case No. 13800 (R. 112) charged both Petitioners along with others with conspiracy to offer bribes and to obstruct due administration of justice. On October 1, 1953, Petitioners pleaded not guilty to each of these three indictments (R. 91, 105, 122).

On October 16, 1953 a new indictment against the Petitioners along with others was returned in Case No. 13833 (R. 148). This indictment was in two counts which "were identical in substance with the corresponding two counts of indictment Number 13,800" (App. A, Joint Appendix, p. 15). On October 21, 1953, Petitioners pleaded guilty to both counts of this conspiracy indictment (R. 158-159, 162).

B. Defense Motions Prior to Trial

On October 15 and 16, 1953, prior to trial, Petitioners filed the following motions:

(1) Affidavit and Motion for a change of judge (R. 18-24, 93, 105, 132).

(2) Motion to transfer to another district (R. 52-53, 93, 105, 132), supported by an exhibit of a group of original newspaper clippings (Original Exhibit A, Case No. 13800, on file with the Clerk, Supreme Court of the United States).

(3) Motion for a bill of particulars (R. 92, 106, 122-124).

The motion for a change of judge was predicated on exhanges between defense counsel and the trial judge (The Honorable Willis W. Ritter) in various preliminary proceedings which the Tenth Circuit acknowledged "evidenced the existence of some feeling between court and counsel" (App. A, Joint Appendix, pp. 12-13); on the announced attitude of Judge Ritter to the charges and the Petitioners (App. F, Joint Appendix, p. 46); and on the fact that "excessive bond was required in some instances" (App. A, Joint Appendix, p. 13). In the Tenth Circuit, it was also urged as further supporting grounds, that *all* defense motions had been overruled by Judge Ritter; that he had overruled motions for judgment of acquittal and to dismiss *without opportunity of argument;*

and that the sentences he imposed were "very severe" (App. A, Joint Appendix, p. 13).

The motion to transfer to another district was made because of the inordinate amounts of publicity substantially all of which was unfavorable to the Petitioners which had been given the case by newspapers, radio and television before it came to trial (R. 52-3; see also Exhibit A., Case No. 13800, on file with the Clerk of this Court). In support of this motion it was contended that this publicity had been so great and so unfavorable to the defendants that it "should cause every literate juror to have an opinion" and the defendants would thereby be deprived of a fair and impartial trial (R. 52). When the point was again argued in the Tenth Circuit, it was also pointed out that twenty-two jurors were dismissed by the Court for prejudice. (Consolidated Brief of Appellants in the Court of Appeals for the Tenth Circuit, p. 6; and see R. 244 *et seq.*)

The motions for bills of particulars naturally varied in each case. All commonly requested that the United States be ordered to provide the names and residences of the jurors mentioned in the various counts, and the manner and method alleged to have been used to influence or bribe them (R. 92, 106, 122-4).

All these motions—for change of judge, of venue, and for bills of particulars—were denied by the Trial Judge. (R. 96, 107, 135) and his denial was sustained by the Tenth Circuit (App. A, Joint Appendix, pp. 11-14).

C. Government Motions Prior to Trial

On October 22, 1953—four days before the trial was scheduled to begin—the United States filed motions to join Cases Numbered 13777, 13778, 13794, 13795, 13796, 13797, 13801, 13802, and 13800 for trial (R. 69, 106, 132); and to sever the Petitioners from trial in Case No. 13800 because they had "entered pleas of guilty to a similar conspiracy indictment in Case No. 13833" (R. 133). On the

following day, the United States filed another motion to consolidate, requesting that Cases Numbered 13794, 13795 and 13800 be joined for trial (R. 93-4).

On the day the trial was scheduled to begin—October 26, 1953—the United States made an oral motion to withdraw its previous motions relating to consolidation and severance and moved orally instead to consolidate Cases Numbered 13777, 13778, 13794, 13795 and 13800 (R. 229). Cases Numbered 13777 and 13778 were substantive cases against the Petitioners in No. 538, October Term, 1954 (R. 10, 75). Cases Numbered 13794 and 13795, as we have noted, were substantive cases against the instant Petitioners. Case No. 13800 was a conspiracy case against the instant Petitioners, the Petitioners in No. 538, and others. All of the Government's motions were granted by the Court (R. 229, 238); and Petitioners' request for a continuance on the ground that they had come to trial unprepared to defend against the conspiracy indictment (Case No. 13800) because the Government had moved earlier that they be severed from the case, was denied (R. 242-3).

D. The Motion to Show Cause for Contempt

On October 26, 1953, the first day of the trial (R. 172-3), without prior notice to or service on Petitioners (R. 189), the United States moved by an order to show cause that all defendants in the consolidated trial be held in criminal contempt for the same acts as were alleged in the indictments (R. 172-3). The Trial Judge granted this motion (R. 174, 190) and took all the defendants into *immediate custody* and set the matter down for *immediate hearing* along with the consolidated trial under the indictments (R. 174). When objections were raised by defense counsel to the form and sufficiency of the notice and motion (R. 195-207), the Trial Judge suggested to the United States Attorney that the "Motion and Notice be re-examined with a view to bringing it into conformity

with the provisions of 42-B [Federal Rules of Criminal Procedure]" (R. 207). On the following day, October 27, 1953, the Trial Judge issued a new order superseding his order of the previous day, directing the defendants to appear on November 2, 1953 to show cause why they should not be punished for contempt (R. 175).

At the conclusion of the trial, the Trial Judge held all defendants guilty of criminal contempt (R. 480), distinguishing this Court's decision in *Nye* v. *United States*, 313 U.S. 33, and relying upon *O'Malley* v. *United States*, 128 F. 2d 676 (CA 8), (R. 474-9). The Tenth Circuit reversed the district court on this question holding that the *Nye* case governed (App. A, Joint Appendix pp. 23-5), and ordered the contempt proceedings dismissed (App. A, Joint Appendix, pp. 25-6).

E. The Plea of Former Jeopardy

On October 26, 1953, Petitioners filed pleas of former jeopardy in Cases Numbered 13800 (conspiracy), 13794 (substantive—Eugene Smaldone) and 13795 (substantive—Clyde Smaldone), on the ground that the charges in these cases were encompassed in Case No. 13833 where they had already entered pleas of guilty (R. 94, 107, 133-134), and objected to proceeding with the trial before disposition of this plea; for if their plea was sustained, once the trial began they would be in jeopardy twice for the same offense (R. 235, 240). Other of the defendants also objected to proceeding with the trial before the plea was disposed of on the ground that being tried in the same trial on the same offenses to which two of their co-defendants had already pleaded guilty constituted highly prejudicial joinder (R. 232-233). Nevertheless, the trial judge reserved his ruling (R. 135), ordered the trial to proceed and, at its conclusion, overruled the plea. (R. 472).

On appeal, the Tenth Circuit held that the plea of former jeopardy should have been sustained in Case Number 13800 but was properly overruled by the district court

in the substantive cases, 13794 and 13795. (App. A, Joint Appendix, pp. 15-16). Petitioners' convictions in Case Number 13800 were reversed and that cause was ordered dismissed as to them (App. A, Joint Appendix, p. 25).

F. Bail

In the days between the indictments and the commencement of the trial, and while all that has been heretofore described was taking place, the Judge was setting bail in the various cases, and efforts were being made to reduce the bail established by him. Since the instant Petitioners did not apply for reduction of bail, the details relating to bail are not detailed here, but are more completely set out under Points 2, 4, and 5, Appendix F, Joint Appendix. It is sufficient to note that at the time of trial, bail for the instant Petitioners, Eugene and Clyde Smaldone, had been set in the amounts of $1,200,000.00 and $1,100,000.00, respectively.[2]

G. The Selection of the Jury

As noted under B, *supra*, p. 6, Petitioners' motion for a transfer to another district was based upon the great amount of unfavorable publicity given the case before it came to trial. This contention appeared to have been born out in the selection of the jury: of the 57 prospective jurors called, 22 were dismissed by the Court for prejudice (R. 243-321). The Court's questioning of the first prospective juror is illustrative. That person admitted

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[2] These amounts are derived from references throughout the record as follows: (1) For Eugene Smaldone—13775 (Consp.) $100,000; 13776 (Subst.) $100,000; 13779 (Consp.) $100,000; 13792 (Consp.) $100,000; 13793 (Consp.) $200,000; 13794 (Subst.) $200,000; 13800 (Consp.) $200,000; 13833 (Consp.) $200,000.

(2) For Clyde Smaldone—13779 (Consp.) $100,000; 13780 (Subst.) $100,000; 13792 (Consp.) $100,000; 13793 (Consp.) $200,000; 13795 (Subst.) $200,000; 13800 (Consp.) $200,000; 13833 (Consp.) $200,000.

And there are other cases still pending, not yet tried and not a part of this record, in which additional bail was also set.

having read about the case "several times" in the newspapers and having heard about the case many times on the radio during "the past several weeks"; and he admitted having formed an opinion about the matters involved in the case (R. 247), to such an extent he did not believe he "could render a fair decision" (R. 248). Twenty-one other talesmen testified similarly. (R. 246-8, 250-1, 252-3, 254-5, 256-7, 258, 258-9, 261, 259-260 and 272, 282-3, 283, 284, 285, 288-90, 292-3, 293, 300-1, 301, 318-20, 320).

H. The Trial and the Sentences

The consolidated trial joined together five defendants under five indictments.[3] Four of the indictments charged substantive offenses; and the fifth indictment charged conspiracy. All but one of the defendants[4] was being tried simultaneously for substantive offenses and conspiracy.

Such a mass trial necessarily engendered confusion and there were frequent objections by Petitioners, as well as the other defendants, that evidence which was coming in did not apply to them (R. 358, 363, 375, 381) or that there was no connection between the testimony offered and the charges in the indictments (R. 422, 424, 429).

All defendants were found guilty on all charges in all indictments, and all defense motions were overruled. Moreover, all defendants were held guilty of criminal contempt.

The Petitioners were sentenced as follows:

> (1) Eugene Smaldone—in Case No. 13794, to a total of 160 years, of which 110 years were suspended, leaving 50 years and, in addition, a fine of $24,000; in Case No. 13833, to a total of 10 years; in Case No. 13800, to a total of 10 years, which was suspended. The aggregate was 60 years and $24,000. (R. 482-3).

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[3] In addition, the criminal contempt proceeding was simultaneously being tried to the Court.

[4] Michael Benallo was charged only as a member of the conspiracy, and there was no substantive case against him.

(2) Clyde Smaldone—in Case No. 13795, to a total of 60 years, of which 10 years were suspended, leaving 50 years and, in addition, a fine of $24,000; in Case No. 13833, to a total of 10 years; in Case No. 13800, to a total of 10 years, suspended. The aggregate was 60 years and $24,000 (R. 484-5).

In addition, each of the Petitioners were sentenced on the contempt "to the same terms in the Federal Penitentiary and to the same fines * * * upon which you have already been sentenced, and the Court suspends the sentences in the contempt matter, conditioned upon serving the sentences and the paying of the fines in the other matters". (R. 487).

At the sentencing, Judge Ritter, the Trial Judge, insisted, over objection, upon sentencing the Petitioners in Case No. 13833 despite the fact that they had entered their pleas of guilty before Judge Knous; and there is nothing to indicate that Judge Knous was not available to do this (R. 482-3). Indeed, so brusque was the sentencing proceedings, that neither the Petitioners nor any of the other defendants were offered an opportunity to make a statement or present information in mitigation of punishment (R.482-7),[5] although the Judgment and Commitment in each instance which Judge Ritter signed indicates that they were.[6]

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[5] Rule 32(a), Federal Rules of Criminal Procedure, App. E, Joint Appendix, p. 36, provides in relevant part:

> "Before imposing sentence the court *shall* afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment". (Emphasis added).

[6] The Language of the commitments states in relevant part as follows:

> "* * * and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, * * *" (R. 98, 107-108, 136-40)

I. The Rulings of the Court of Appeals

The appeal to the Court of Appeals was taken on a consolidated record and brief filed by all the defendants. While that Court commended the appellants for so proceeding because it "has greatly lightened our work in considering the issues presented", (App. A, Joint Appendix, p. 3), as will subsequently appear, this consolidated appeal also resulted in confusion and substantial appellate errors.

The Court of Appeals reversed the trial court in the following particulars:

(1) It held the contempt proceedings improper and ordered them dismissed as to all defendants.

(2) It held Petitioners' plea of double jeopardy to be good in Case No. 13800, and accordingly ordered their convictions in that case reversed and the cause dismissed as to them.

(3) It reversed the conviction of Micheal J. Benallo as being completely unsupported by the evidence.

(4) It reversed the convictions of Petitioner Eugene Smaldone on eight of the sixteen counts in Case No. 13794 on the ground that there was no evidence to support the verdicts or judgments.

In all other respects, it affirmed the rulings and judgments of the District Court.

REASONS FOR GRANTING THE WRIT

I

In the Court below, Petitioners attacked the indictments on the ground that they "were not sufficient in law and failed to charge an offense against the laws of the United States". *Point One, Consolidated Brief of Appellants,* Court of Appeals for the Tenth Circuit. pp. 19 *et seq.* The claim was that "they are all equally vague, indefinite, and represent masterpieces of generality."

Id. at p. 20. The primary complaint was that the indictments charged Petitioners with having " 'contacted a petit juror' or 'contacted a friend of a petit juror', alleged dates of the various 'contacts' are stated, but in no instance is the name of any 'petit juror' mentioned, nor the name of any 'friend' of any petit juror". *Ibid.* Petitoners contended further that there had been no showing of

> "* * * how many prospective jurors were summoned on the panels * * * The indictment left to pure guesswork what petit jurors were involved, as well as what friends of said jurors had been 'contacted' ". *Ibid.*

And this attack went to all the indictments, substantive and conspiracy alike, as the references in the briefs for Appellants and Appellee below make plain.[7]

The Court below treated this assignment of error as if it were limited to conspiracy indictment No. 13800, although recognizing that the "appellants state in general that the *indictments* failed to state an offense against the United States." (App. A, Joint Appendix, p. 7) (Emphasis added). But this selection, as will appear, was unfortunate because it led the Court into a serious error which appears on the face of its own opinion.

Having selected indictment No. 13800, which charged conspiracy, it limited its consideration of the attack for vagueness to a determination of whether the "indictment fails to set out the essential elements necessary to constitute the offense of conspiracy * * *." *Ibid.* Observing that the "primary complaint is that the indictment refers to petit jurors only in general; that it fails to show how many petit jurors were summoned on the panels and left to pure guesswork what petit jurors were involved, as well as what friends of said jurors had been contacted," *Ibid;* it answered:

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[7] Consolidated Brief of Appellants, Court of Appeals for the Tenth Circuit, pp. 19, 20, 24, 25, 32, 33, 34. Brief of Appellee, pp. 18 et seq.

> "This argument overlooks the essence of the offense of *conspiracy*. The gist of the offense charged is the unlawful *agreement* and *understanding* between the defendants that they would tamper with members of the panel of jurors. How many or which jurors were to be contacted *was not a part of the offense of conspiracy.*" *Id.* at 7-8. (Emphasis added).

The Court then examined the language of Indictment No. 13800 and concluded that there was no uncertainty with what the Petitioners were charged. "They were charged with *conspiring* to tamper with a particular jury, particularly described, and to be used in a particular case, the name of which was given and the date on which the case was to be tried was set out in the indictment." *Id.* at 8. (Emphasis added).

The Court then went on to state:

> "What individual jurors, or how many, or what friends of prospective jurors they undertook to contact *would become material only when they went to trial for the substantive offenses.*" *Id.* at 8-9. (Emphasis added).

Apparently, because it had been addressing itself to Case No. 13800 charging conspiracy, the Court below did not realize that it had before it also the indictments in Cases Numbered 13794 and 13795, charging the substantive offenses, on which Petitioners had gone to trial, had been convicted, and to which their attack for vagueness also ran. The Court, later in its opinion, merely tested the indictments in these cases against the evidence in the record and held: with regard to Case No. 13795, "each of the six counts is supported by competent evidence" (App. A, Joint Appendix, p. 21); and with regard to Case No. 13794, that the "record supports the verdict and judgment of conviction entered thereon on counts one, three, five, six, seven, thirteen, fourteen and fifteen * * *." (*Id.* at p. 20).

We have thus the anomalous situation of a court indicat-

ing clearly that indictments lacking certain material information would be insufficient, and at the very same time sustaining convictions predicated on indictments which lack the information which it has itself held to be material as to them.

The indictments in Cases Numbered 13794 and 13795 charging substantive offenses against Petitioners (R. 85, 102) do not indicate "what individual jurors, or how many, or what friends of prospective jurors they undertook to contact", which, according to the Court below are "material" allegations in trials for substantive offenses. (App. A, Joint Appendix, pp. 8-9). Yet Petitioners went to trial on these offenses, were denied bills of particulars requesting this "material" information (R. 96, 107), were convicted for these offenses (R. 98, 107); and the Court below in apparent inadvertence not only sustained the trial court's denial of bills of particulars, but also sustained these substantive convictions (App. A, Joint Appendix, pp. 20, 21, 25-26).

Had the Court below actually subjected the indictments in Cases Numbered 13794 and 13795 to the test of sufficiency —which it had itself recognized—that the indictments must be specific enough so as to protect the Petitioners from being placed in jeopardy for the same offense a second time,[8] it would have been compelled to hold these indictments insufficient on their face. Since none of the counts in either indictment name the jurors or friends of jurors whom the Petitioners allegedly sought to contact, Petitioners would be unable to plead these indictments as a bar to future prosecutions based upon the same subject matter. And this is particularly consequential because other indictments charging these Petitioners with offenses similar to those involved in this proceeding are still pending and awaiting trial in the District Court.

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[8] App. A, Joint Appendix, p. 7. See *Hagner* v. *United States*, 285 U.S. 427, 431. See also *Barone* v. *United States*, 205 F. 2d 909, 912 (C.A. 8); *Butzman* v. *United States*, 205 F. 2d 343, 348 (C.A. 6), *cert. den.* 346 U.S. 828; *Todorow* v. *United States*, 173 F. 2d 439, 447 (C.A. 9).

This was clearly a "plain error" and a "defect" "affecting substantial rights", within the meaning of Rule 52(a), *Federal Rules of Criminal Procedure, infra;* cf., Rule 40, 1. (d) (2) *Revised Rules of the Supreme Court; Wiborg* v. *United States,* 163 U.S. 632, 658, and cannot be permitted to stand.[9] In this respect, the decision below is clearly erroneous and this Court, in the exercise of its "supervisory authority over the administration of criminal justice in the federal courts", *McNabb* v. *United States,* 318 U.S. 332, 341; cf., *Offutt* v. *United States,* No. 27, October Term, 1954, U.S. ; should accept the case for review.

II.

Petitioners' trial proceeded simultaneously on three indictments, two charging substantive offenses and one charging the related conspiracy. Prior to the trial, however, Petitioners had pleaded guilty to a conspiracy indictment which was identical (R. 158); and at the beginning

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[9] This is not the only error on the face of the opinion below. At p. 21, Appendix A, Joint Appendix, where the Court was discussing the substantive indictment against Clyde Smaldone in Case No. 13795, it equated Counts 1 and 3 of that indictment to Counts 5 and 13 of the substantive indictment against Eugene Smaldone in Case No. 13794. Counts 1 and 3 of No. 13795 refer to acts occurring on September 2 and 10, respectively (R. 102-3); but Counts 5 and 13 of No. 13794 refer to acts occurring only on September 2 (R. 87, 90). Count 3 in 13795 does not therefore equate with Count 13 of 13794.

Undoubtedly, the Court meant to equate Count 3 of 13795 with Count 15 of 13794 (R. 90); but later in its opinion it equates Counts 2 and 4 of 13795 with Counts 7 and 15 of 13794 (App. A, Joint Appendix, p. 21), and this appears to be correct. Only Count 16 of 13794 (R. 91) is left to be equated with Count 3 of 13795, but Count 16 was held to be duplicitous and the conviction based upon it was reversed (App. A, Joint Appendix, p. 20). Clyde Smaldone's conviction on Count 3 of 13795 is thus left suspended in mid-air with nothing to support it in the record.

And no good reason appears why Counts 3 and 4 of No. 13795 are not just as duplicitous as the Counts in 13794 which the Court below held to be duplicitous (App. A, Joint Appendix, pp. 19-20).

of this trial pleaded the bar of double jeopardy. (R. 235-240). This plea was held for decision by the trial judge pending the completion of the trial, and at that time was summarily denied. (R. 472).

A. *Double Jeopardy In Fact.* The Court below reversed the denial of the plea of double jeopardy and pointed out that the mandatory language of the Fifth Amendment "in plain language means that one may not be tried a second time for the same offense and that was done with respect to Indictment No. 13800 over the protest and objection of these two appellants." (App. A, Joint Appendix, p. 16). In confining its reversal to the single conspiracy indictment, the Court was posing only part of the double jeopardy issue actually raised on this record.

The Court below should have ruled that the entire trial violated the standards established by the Constitutional proscription against putting any person in jeopardy a second time. Being tried on the other indictments which were coupled with Indictment 13,800, was just as much a violation of the Fifth Amendment as being tried on 13,800. The Court below corrected one form of double jeopardy error; but it failed to perceive another and equally insidious form.

Since the Court below correctly held that the trial judge should have granted the plea of former jeopardy when it was made, before the commencement of the trial, it should have held that all that followed this erroneous ruling was a deprivation of Petitioners' Constitutional rights. The entire trial, and not only the single indictment of conspiracy,[10] should have been reversed as a transgression against the Fifth Amendment's commandment.

The failure of the trial judge correctly to rule at the outset that the Fifth Amendment barred the trial of the

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[10] The court below held that the plea of double jeopardy did not encompass the substantive indictments of 13,794 and 13,795. That may be so; but Petitioners are entitled to a new trial on them.

conspiracy indictment necessarily meant that the entire trial proceeded on an illegal basis and in fact placed Petitioners in double jeopardy. When the judge and jury throughout a trial are under a wholly erroneous impression as to the precise indictments upon which defendants are being tried, the entire trial is tainted with inevitable error; it is impossible to reconstruct what would have occurred had the correct ruling been made. The decision of the Court below could not and did not remove the pervasive effects of the error. The failure of the trial judge to give full legal recognition to prior proceedings involving the defendants must be reversed by this Court, cf. *Sealfon* v. *United States*, 332 U. S. 535, because the entire trial was indelibly stamped with error and unfairness. The defendants certainly have not had the fair trial to which the most elementary concepts of due process would entitle them.

B. *Prejudicial Commingling of Evidence.* It is self-evident that conspiracy indictments are more general in scope, and the proof required for conviction thereunder can be more indirect and circumstantial, than that involved in substantive offenses. Cf. *Old Monastery Co.* v. *United States*, 147 F. 2d 905, 906 (C.A. 4) *cert. den.* 326 U. S. 734. The degree to which prosecutors have eagerly availed themselves of a joinder of broad conspiracy counts with substantive counts, to insure for themselves some conviction of particular defendants, has been the subject of unfavorable comment by Justices of this Court. See *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440, 445-458 (concurring opinion); *Report of Conference of Senior Circuit Judges*, 1925, cited in *Pinkerton* v. *United States*, 328 U.S. 640, 644 at fn. 4. Even where this Court has evidence, offered in a trial in which conspiracy and substantive offenses are joined, to apply to the substantive offense, or has upheld the use of admissions or declarations of one co-conspirator against another, it has been careful to point out that the trial judge must be circumspect in his admis-

sion of such evidence. See, e.g., *Lutwak* v. *United States*, 344 U. S. 604, 619, where the majority of this Court warned, "These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose."; and the dissenting opinion in that case decried the fact that "one of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or omissions which color the case against all." (344 U. S. at 623).

The record in this case does not indicate any meticulous judicial identification of the evidence admitted. The record gives no indication that the trial judge was concerned to define which evidence applied to which indictments and which defendats. On the contrary, it displays a complete intermingling of all the evidence on all the defendants and on all the indictments. This trial was as indivisible as one ball of wax. It is impossible to eradicate the effects of the evidence which should have been confined solely to the conspiracy charges from the entire judicial process at the trial which resulted in the mass convictions.

In its consideration of this issue, the Court below cut itself off abruptly at the point where it reversed the judge for failure to grant the plea of double jeopardy in Case No. 13800. It should have proceeded to consider the overall effects of permitting a trial to proceed when one of the indictments involved in its integral proceedings was in fact barred because of double jeopardy; and wherein evidence was admitted on the substantive counts which might well have been excluded had the plea of double jeopardy been honored at the proper time. Indeed, the Court below

could properly have held that the mere fact that the jury could consider, as against the Petitioners, the *indictment* in Case No. 13800—with 22 overt acts set out under each of the two counts—while they were weighing the guilt of the Petitioners on the substantive cases, constituted prejudicial error. While we believe such an error would saturate a trial with impropriety and lack of regard for defendants' rights under any indictment and before any judge and jury, we must observe that this is especially true under the special circumstances of this case. (See Points I and III). To insure that the essentials of due process under the Fifth Amendment will be maintained where a valid plea of former jeopardy was entered, this Court should grant certiorari and indicate the extent to which an erroneous denial of such a plea vitiates the subsequent trial and the evidence admitted therein.

III

Questions 3 and 4 of the Questions Presented, p. 3, *supra*, raise important issues which go to to the manner in which a criminal prosecution is to be conducted where unpopular defendants are brought to trial on charges which arouse public passion, in an atmosphere inflamed by prejudice, and where the trial judge himself evidences in his attitude and comportment an attitude which is far from impartial.

The record in this case amply demonstrates that both judge and jury completely lost sight of this Court's admonition in *Ex parte Quirin*, 317 U.S. 1, 25: "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." That the essentials of a fair trial embodied in the Constitution were disregarded in this case is illustrated by the refusal of the trial judge, sustained by the Court below, to grant a change of venue and to recuse himself for bias and prejudice.

A. *Motion for Transfer to Another District.* Prior to the commencement of this trial all defendants moved to

transfer the trial to another district (R. 52-3), urging that the District of Colorado had been saturated with unfavorable publicity by radio, television and the press; that Petitioners had been stigmatized as gangsters and outlaws; and that no jury sitting in the District could be free from fatal prejudice against them. The Judge recognized that these were allegations of substance and that "it certainly would be a travesty on justice if we held a trial here with no expectation at all that the defendants might be found innocent." (R. 208-209). Nevertheless, he denied the motion, evidently believing that it was possible for an impartial jury to be selected.

The Court below did not discuss the denial of the motion for transfer of the trial as such, but did hold that "There is no *affirmative* evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror." (App. A, Joint Appendix, p. 13) (Emphasis added.[11]

Neither the Court below nor the trial judge, in ruling on this point, made any reference to the newspaper articles about the Petitioners and the trial which had been circulated throughout the District in the period before trial, and which were submitted as Exhibit A to the Motion for Transfer. (R. 52). This Exhibit, which was before both Courts below, is on file with the Clerk of this Court, and we respectfully urge this Court at least to savor its flavor and note its volume.

The question of the extent to which widespread adverse publicity may deprive a defendant of a fair trial has been arising with increasing frequency in recent years; and this Court has not as yet set forth the principles to be applied

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[11] It should be noted, however, that the Court below reversed convictions on 8 of the 16 counts in Case No. 13794 because "there is no evidence to support the verdict" (App. A, Joint Appendix, p. 20); and also reversed the conviction of Micheal J. Benallo in Case No. 13800 because the "record does not reveal a single bit of evidence" tying him to the conspiracy (*Id.* at p. 22).

in such cases. This Court's concern up to now has been primarily directed to the problem on the other side of the medallion: whether publicity and pressure upon the public, the judge or the jury, which may effect the impartiality of a judicial proceeding, justifies the use of the contempt power against the offending news organ. Cf., *Baltimore Radio Show* v. *Maryland,* 338 U.S. 912; *Craig* v. *Harney,* 331 U.S. 367; *Pennekamp* v. *Florida,* 328 U.S. 331; *Bridges* v. *California,* 314 U.S. 252. See generally, *Note,* 59 Yale L.J. 534. There is no claim in this case that any action of the press was contemptuous.

In *Stroble* v. *California,* 343 U.S. 181, 191-195, a majority of this Court did reject a contention that a newspaper account of a confession so tainted a trial as to deprive the petitioner of due process, for a number of specific reasons; but that case, which reviewed a State conviction under the Fourteenth Amendment, was evidently not regarded by this Court as an appropriate vehicle for establishing the standards whereby the *federal* courts could protect the rights of defendants in a community atmosphere moulded by antagonistic publicity.

The factors absent in *Stroble* are present here. This, of course, is a case which arose under federal statutes and was tried and reviewed in federal courts. Petitioners did move for a change of venue; the failure to make such a motion was characterized as "significant" even if not "dispositive" in *Stroble,* 343 U.S. at 194. Further, and in contrast to the findings made on each point in *Stroble,* 343 U.S. at 195, in this case the unfavorable publicity continued up to the date of trial, was not limited to a single episode, and was not voluntarily revealed, (Original Exhibit A, Case No. 13800 on file with the Clerk); and an affirmative showing of bias as regards the jury was manifested by the fact that 22 of the 57 prospective jurors questioned admitted prejudice, while the others indicated that they had heard of or read about the case they were about to try. (R. 244-322). Moreover, this case contains an additional feature: the trial judge was actually ordering

"information to be given to the Press". (R. 12-13). We submit that this is an appropriate case for this Court to establish the principles which should govern the federal courts in dealing with this issue. See *Stroble* v. *California*, 343 U.S. 181, 191-195, 198-202; *Shepherd* v. *Florida*, 341 U.S. 50 (concurring opinion); *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 (opinion on denial of cert.).

The pressing nature of the problem is manifested by the fact that more and more of the federal courts have been called upon to make, and have made, decisions on the issue. In *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), the First Circuit held that the trial judge had abused his discretion by proceeding with the trial and not granting an indefinite continuance, when the publicity generated by a Congressional committee hearing still dominated the public conception of the defendant. "It is fair to say that, so far as the modern mass media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges." 199 F. 2d at 111.

And other federal courts have adhered to the approach taken in *Delaney*: E.g., *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y.) where a change of venue was granted because of articles labelling the defendant as a "mobster" and "racketeer" appearing in the press on the morning of the trial. *Cf., Application of Electrical, Radio and M. Workers*, 111 F. Supp. 858, 869 (S.D.N.Y.). Other decisions have made one distinction or another to justify the denial of a change of venue: (1) newspaper articles cited by counsel not part of record, *Schino* v. *United States*, 209 F. 2d 67, 70-1 (C.A. 9), *cert. den.* U.S. ; *United States* v. *Moran*, 194 F. 2d 623, 625 (C.A. 2); (2) adverse publicity did not persist through months immediately preceding trial, *United States* v. *Rosenberg*, 200 F. 2d 666, 668-70 (C.A. 2); *United States* v. *Carper*, 13 F.R.D. 483, 486 (D.C.D.C.); (3) only two of the twelve jurors selected had read anything about the case, *United States* v. *Moran, supra;* (4) failure

to timely move for transfer, *United States* v. *Rosenberg, supra;* but none of these distinctions apply in this case.

The trial judge denied the motion to transfer in the hopes that a jury "that hasn't been biased or prejudiced" could be selected from "a large panel." He recognized the difficulties of the situation, that "a good deal of unfortunate publicity has gotten out about this" but thought nevertheless, "we ought to try it". His suggested *modus operandi* was to carefully question the members of the jury panel because he believed "that a juror answers truthfully". (R. 208-9). But this was precisely the procedure upon which the First Circuit, in the *Delaney* case, *supra,* frowned.

> ". . . No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But • • • one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective preception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity • • • (199 F. 2d at 112-113). Since he was obliged to stand trial in the hostile atmosphere engendered by the extra courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions • • •" *Id.* at 116.

The Second Circuit, too, has just recently underscored the importance of not accepting statements of members of a panel that they were not "influenced", when these statements run counter to "human nature being what it normally is". *United States ex rel. Accardi* v. *Shaughnessy,* (C.A. 2) (decided January 7, 1955) *on remand from this Court,* 347 U.S. 260. In that case, members of the Board

of Immigration Appeals had testified under oath that they had not been influenced by statements made by the Attorney General with regard to the Relator. The trial judge accepted these statements because he could see "no rational ground for disbelieving the witnesses". But the Court of Appeals ordered the decision reversed. Judge Frank wrote:

> "We accept it as a fact that the Board members *consciously* believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order * * * and that, beyond that, those statements did not have any effect on the Board's decisions. But it is incredible, human nature being what it normally is, that the Attorney General's statements * * * did not *unconsciously* influence the Board members * * *. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable".

And Judge Clark, concurring separately, observed:

> "all judges naturally and honestly believe that they are above bias. But the facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary".

If this is the test applied to members of an administrative tribunal specially selected and appointed to make decisions under a particular federal law, it is *at least* applicable to laymen drawn from every walk of life and without prior training and experience in deciding controversies from the evidence before them. The questioning on *voir dire* below certainly creates "a presumption of bias not overcome" by the jury panel members' declarations to the contrary (R. 244 et seq.)

The brief discussion of these recent cases makes it apparent that the issue of a fair forum in which to hold a controversial trial, and the test by which to examine the impartiality—or likelihood of impartiality—of a jury, has been arising with great frequency in recent years in the

federal courts. In the general approach to the safeguarding of a defendant's right to a fair trial, there is a vast difference between the decision in *Delaney, supra,* and the decision of the Court below. And there is also a difference in the factors which should be considered and the emphasis they should be given in determining whether a change of venue should be granted. These views and standards will continue to be diverse, and the fundamental rights of a defendant will vary from court to court, until this Court sets the definitive guideposts. We think this case contains all the ingredients for a clear determination of the problem.

B. *Motion for Change of Judge.* The Court below affirmed the refusal of the trial judge to excuse himself for bias and prejudice, apparently on the twin grounds that when an affidavit is filed under 28 U.S.C. Sec. 144 the judge need do no more than test the legal sufficiency of the allegations; and that various of the trial judge's rulings "standing alone" did not establish bias and prejudice (App. A, Joint Appendix, pp. 12-13). This piecemeal review, analyzing the sufficiency of an affidavit filed prior to trial, and then examining each subsequent ruling in an isolated context, does not comport with the principle that the "right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him." *Whitaker* v. *McLean,* 118 F. 2d 596 (C.A. D.C.)

While the Affidavit in this case may not have been sufficient on its face to require the trial judge to recuse himself, it would seem—and the Court below appears to have recognized—that the sufficiency of the Affidavit was at least debatable.[12] And "where the sufficiency of an af-

[12] While this colloquy shows that the proceedings were acrimonious at times and evidenced the existence of some feeling between the Court and counsel, we do not think it is of such a nature as to show upon its face bias and prejudice." (App. A, Joint Appendix, pp. 12-13).

fidavit is at least debatable, if the judge refuses to disqualify, the reviewing court will consider whether actually in the trial of the case any prejudice was manifested toward the affiant by erroneous rulings or by the manner and demeanor of the judge towards the affiant." *United States* v. *Buck*, 23 F. Supp. 503, 506 (W. D. Mo.).[13]

This the Court below failed to do. It noted, for example, that "the sentences imposed are very severe", but thereafter observed that "*standing alone* the imposition of a sentence which the Court had lawful authority to impose" did not show bias and prejudice. (App. A, Joint Appendix, p. 13) (Emphasis added). Likewise, with regard to complaints made respecting excessive bond, the overruling of *all* of defendants' motions and the denial of argument on motions for acquittal and to dismiss, the Court below held that these "*in themselves alone*" were not sufficient to show bias and prejudice. (*Ibid.*)

The Court below obviously did not take into account the myriad episodes throughout the proceedings which make it plain that the Petitioners were denied the benefits of a trial before an impartial judge. A full catalogue of these episodes is set out in Appendix F, Joint Appendix, pp. 38 *et seq.* They run the full gamut from: setting excessive bail (exceeding a million dollars for each of these Petitioners) (p. 39); giving information of an unfavorable nature to the press (p. 39); refusing to rule on a plea of double jeopardy until after the trial (p. 41); refusing continuances and forcing various defendants to go to trial on matters on which their counsel were justifiably unprepared (pp. 40-41, 42-44); and many others.

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[13] Where an affidavit of bias and prejudice has been filed, and even where appellate courts have affirmed the refusal of the trial judge to recuse himself, they have scrutinized the entire record to insure that there had been no prejudice and bias in the rulings during the course of the actual trial. *Eisler* v. *United States*, 170 F. 2d 273, 281 (C.A. D.C.); *Ferrari* v. *United States*, 169 F. 353, 355 (C.A. 9); *Scott* v. *Beams*, 122 F. 2d 777, 788-789 (C.A. 10). And see also *Connelly* v. *United States District Court*, 191 F. 2d 692 (C.A. 9).

Indeed, the Court below appears not even to have taken into consideration the fact that on three separate occasions in related or interlocutory proceedings *in this case*, it itself had *reversed* Judge Ritter for abusing his discretion: (1) the forfeiture of the bond of Eugene Smaldone in the tax evasion case (p. 38; *Smaldone* v. *United States*, 211 F. 2d 161); (2) reducing the bail set by Judge Ritter for two of the defendants from $400,000 each to $25,000 each (p. 40); and (3) granting bail pending appeal to two defendants after Judge Ritter denied them any bail (p. 40).

We believe that the record in this case plainly lacks what the Sixth Circuit has characterized as the necessary "atmosphere of judicial calm" and, when this is lacking, a case must be remanded for a new trial. *Moskum* v. *United States*, 143 F. 2d 129, 130 (C.A. 6). Indeed, the Sixth Circuit has held that if only to eliminate the "chance" that any unfairness may have existed, a conviction should be reversed and remanded for further proceedings before another judge. *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C.A. 6). And see *Whitaker* v. *McLean*, *supra*.

If *a* "chance" of unfairness is the test for remand, we believe that this test has been more than fulfilled in the instant case. In denying remand, the Court below has apparently adopted a different standard from that followed in other circuits.

Moreover, the Court below did not consider the cumulative effect of these irregularities upon the fairness of the proceedings. By looking at each action "standing alone", it violated this Court's warning that a reviewing court "*must* take into account what the error meant * * * *not singled out and standing alone*, but in relation to all else that happened." *Kotteakos* v. *United States*, 328 U.S. 750, 763. (emphasis added).

IV

In *Braverman* v. *United States*, 317 U.S. 49, this Court in an unanimous opinion delivered by Chief Justice Stone decided the "question whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies". 317 U.S. at 52. The rule laid down in that case was as follows:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.*" 317 U.S. at 53 (Emphasis added).

The two conspiracy indictments involved in the instant case—13800 and 13833—are identical to the one in the *Braverman* case in that they charge—and the evidence at best only proved—"a single agreement". The indictment in *Braverman* was in seven counts "each charging a conspiracy to violate a separate and distinct revenue law". The indictments in this case are in two counts each charging a conspiracy to violate a separate and distinct provision of Title 18: *viz.*, Sections 206 and 1503.

Moreover, in the instant case, "the precise nature and extent of the conspiracy" has been held by the Court below to be a single agreement. "The general scheme was to procure the release of Eugene Smaldone in the criminal case which was pending against him by bribing and corrupting members of the panel from which the specific jurors selected to try the case were to be selected. • • • It was the intent and purpose of the original conspiracy to do what was necessary in the minds of the conspirators to effect such release in the case pending against Smaldone".

(App. A, Joint Appendix, p. 11). "All the Government had to prove was the unlawful agreement to tamper with this specific jury in the manner specifically set out therein, for the purpose of violating the two criminal statutes involved." (*Id.* at p. 8).

And the Government, in its brief below, conceded as much: "the entire matter sprang from one basic purpose and all the transactions were calculated to reach that end". (Brief of Appellee, Court of Appeals for the Tenth Circuit, p. 31). "The crux of the matter is the whole thing was one nefarious scheme". (*Id.* at p. 34).[14]

Despite these analyses, Petitioners' separate convictions on the separate counts of the indictment in Case No. 13833 were permitted to stand.[15] This, because undoubtedly in the confusion arising out of a consolidated trial and appeal of five defendants on five indictments, and because of the multiplicity of the questions involved, this fundamental matter was overlooked by both the trial and appellate courts.[16] Overlooked or not, Petitioners have been convicted and sentenced twice for the same violation—which is precisely what this Court in the *Braverman* case said should not be done.[17]

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[14] While the statements quoted from the Court's opinion and the Government's brief were not directed to the question here presented, they were addressed to the nature of the conspiracy involved, which is the same conspiracy to which the instant point is addressed. This conspiracy cannot be one kind for one argument and another kind for another argument.

[15] As were the convictions of Petitioners William Calvaresi and and Jerry Benallo, Jr., in No. 538, under the indictment in Case No. 13800.

[16] Rule 52(a), Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Cf.*, Rule 1, (d)(2), Revised Rules of the Supreme Court. And see *Wiborg* v. *United States*, 163 U.S. 632, 658.

[17] "The single agreement is the prohibited conspiracy, and however diverse its objects, it violates but a single statute * * *. For such a violation only the single penalty prescribed by the statute can be imposed." 317 U.S. at 54.

The question presented arises frequently in conspiracy prosecutions, and the principle enunciated in *Braverman* has won consistent adherence. E.g., *Carrado* v. *United States*, 210 F. 2d 712, 717 (C.A. D.C.) *cert. den.* 347 U.S. 1020; *Moss* v. *United States*, 132 F. 2d 875, 877 (C.A. 6); *United States* v. *McGee*, 117 F. Supp. 27, 32 (D. Wyo.). *Cf., May* v. *United States*, 175 F. 2d 994, 1002 (C.A. D.C.) *cert. den.* 338 U.S. 830. Not only have the decision and judgments below failed to give cognizance to this principle; they have sanctioned convictions which run directly counter to it. In so doing, the Courts below have denied Petitioners the fundamental protection of substantial rights which this Court has expressly taken pains to preserve.

V

The indictments in this case, alleging violations of 18 U.S.C. Sec. 206, charge the defendants with attempting to bribe "a juror summoned to the panel". Section 206 of Title 18, however, prohibits such activity only with regard to a "juror . . . authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote (etc.) . . ."

There can be no argument that a "juror" has no authorization to hear or determine any cause until he has actually been selected and sworn; he cannot "vote" or take any "action" in any cause until it has been tried before him unless he sits as one of the jury. The language of Section 206 clearly does not encompass a juror who has not been selected or sworn; and it would seem plain that a person does not become a "juror" within the meaning of Section 206 merely by being "summoned to the panel" for potential or prospective jury duty.[18]

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[18] Compare Rule 24(a), Federal Rules of Criminal Procedure, referring to "prospective jurors"; with 24(c) dealing with jurors who have been selected and sworn.

The Court below, while noting the restrictive language in the statute, nevertheless held 206 applicable, because "It is difficult to believe that Congress in the passage of this Act intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case." (App. A, Joint Appendix, p. 9). In so holding, the Court below ran clearly counter to the plain language of the statute and violated the fundamental precept that criminal statutes must be strictly construed.

The decision of the Court below is not limited in its effect merely to Section 206, but would presumably apply to Section 208 as well,[19] since that Section, which forbids the *acceptance* of bribes by jurors, contains the same descriptive language defining a "juror". Moreover, it would appear that both Sections 206 and 208 should be read along with Section 207[20] which forbids the acceptance of bribes by *judges;*[21] and Section 207, it should be noted,

[19] 18 U.S.C. Sec. 208 provides:

"Whoever, being a *juror*, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States commissioner, or other person *authorized by any law of the United States to hear or determine any question, matter, cause, controversy, or proceeding*, asks, receives, or agrees to receive, any money or thing of value, or any promise or agreement therefor, because of or with intent to be influenced in his vote, opinion, action, judgment, or decision, shall be fined not more than $2,000 or imprisoned not more than two years, or both." (emphasis added).

[20] See Reviser's Note following 18 U.S.C. Sec. 206.

[21] 18 U.S.C. Sec. 207 provides:

"Whoever, being a judge of the United States, accepts or receives any sum of money or other bribes, present or reward, or any promise, check, order, contract, obligation, gift or security for the payment of money, or for the delivery or

prohibits the acceptance by a judge of bribes given with intent to influence him in any cause "pending before him".

Does the broad construction adopted below with regard to Section 206 extend also to Section 208? And does it also apply to Section 207, so that the phrase "pending before him" must be ignored just as the qualifying language in Section 206 was ignored? Certainly, in an area of the law as fundamental and as delicate as that encompassed by these provisions, these important ambiguities should not be left unresolved.

None of the cases cited by the Court below as authority for its all-inclusive definition of "jurors" dealt with Section 206. *State* v. *Woodson*, 43 La. Ann. 905, 9 So. 903, is a decision of the Louisiana Court construing a Louisiana statute, which is analogous, at best, to 18 U.S.C. Sec. 1503.[22] *United States* v. *Marsh*, 106 F. 474, involved the application of the term "juror" in a civil suit over fees to be paid a clerk of a district court. And *United States* v. *Russell*, 255 U.S. 138, dealt only with the broader provision of the Criminal Code which is now Section 1503. That case was not concerned with the definition of the term "juror", but rather with the meaning of the word "endeavor". The casual definition of "juror" contained in that opinion was language incidentally used by this

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conveyance of anything of value, because of or with intent to be influenced in any opinion, judgment or decree in any suit, controversy, matter or cause *pending before him*, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be disqualified from holding any office of honor, trust or profit under the United States." (emphasis added).

[22] Even Louisiana does not so loosely define "juror" in all its statutes. For at least one decision ruling, in another statutory context, that the word "juror", "has reference to accepted jurors and not prospective jurors.", see *State* v. *Towns*, 205 La. 530, 17 So. 2d 814, 815. And other state statutes analogous to Section 1503 have been interpreted as applying solely to "jurors" who have actually been selected and sworn. See e.g., *State* v. *Willford*, 86 S.W. 570, 572 (Mo. Ct. App.).

Court in its discussion of the problem of "scienter".[23] An examination of the briefs in the *Russell* case, No. 143 of the 1920 Term, reveals that neither party discussed nor was concerned with the definition of "juror". The reliance placed by the Court below upon *United States* v. *Russell* appears to be erroneous, and that opinion lends no support for the novel proposition for which it was cited.

A construction of the word "juror", as used in Sec. 206, has never been rendered by this Court. The construction made by the Court below is unprecedented; appears to be contrary to the plain language of the statute; and relies upon an inapposite decision of this Court. The expanded construction of "juror" adopted by the Court below can apply not only to Section 206 but also to Section 208, and may affect Section 207 as well. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

VI

The decision of the Court below also raises important issues regarding the application and requirements of two of the Federal Rules of Criminal Procedure; and in each instance holds contrary to the express language and mandate of the Rules involved.

A. *Rule 25.* Rule 25, provides that another Judge may assume the duties of the trial judge "If by reason of

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[23] The Court stated: "The indictment charges that defendant knew that William D. Russell was a petit juror, in the discharge of his duty as such juror, and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn." 255 U.S. at 143.

It should be noted that even under this test, the indictments in this case are defective. So far as Section 206 is concerned, the indictments charge only that such individuals were "summoned to the panel". And the indictments under Section 1503 contain no allegation that there was any endeavor to influence any "petit juror . . . *in the discharge of his duty*", the italicized words being omitted from these indictments but evidently thought essential by this Court in its *Russell* decision.

absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt". This language appears clearly to require that only the judge before whom a trial was held or a guilty plea was entered may sentence a defendant unless—for the reasons set forth in the Rule—he is unavailable.

Petitioners' pleas of guilty to Indictment 13833 were entered before Judge Knous, who accepted these pleas and then referred the cases to the probation department for pre-sentence reports (R. 159, 162). Judge Ritter, nevertheless, insisted upon sentencing them without even indicating that Judge Knous was unavailable or that he had made any inquiry to determine whether Judge Knous was available (R. 482).[24] Indeed, it appears from the record that Judge Ritter did not care whether Judge Knous was available:

> "The Court: • • • Now, on Case No. 13833.
> "Mr. Morrissey: Your Honor, that plea was taken before Judge Knous.
> "The Court: Well I am sentencing him.
> "Mr. Morrissey: Well, Your Honor, note our objection.
> "The Court: Sure. • • •" (R. 482).

This colloquy, we believe, manifests a blatant disregard for the requirements of the Rule.

The Court below, in an effort to justify Judge Ritter's action, pointed out that the pleas had been entered without the taking of evidence (App. A, Joint Appendix, p. 15); thus, apparently implying that there was a distinction between a judge before whom a trial is had and a judge before whom a plea is entered. No such distinction is

[24] When objection to this method of proceeding was raised for the second time by Petitioners, Judge Ritter indicated that Judge Knous had asked him to impose sentence (R. 485); but neither he nor Judge Knous indicated the nature and basis of this request or how it met any of the conditions of Rule 25.

drawn in Rule 25: the term "tried" in the Rule embraces the entry of a guilty plea;[25] and the Rule applies after "a verdict or finding of guilt", and apparently the term "verdict" refers to the action of a jury (see Rule 31), and the term "finding" to the action of a judge. Nor does Rule 25 draw a distinction between pleas of guilty and not guilty, nor between cases in which a judge hears witnesses and where he does not. Such niceties are irrelevant to the more fundamental concept that one judge and one only is empowered to dispose of a whole cause from beginning to end; and that an accused shall have the same judge to adjudicate his guilt and to prescribe his sentence.

The only decision which the Court could muster in support of its view was *Owens* v. *Hunter,* 169 F. 2d 971 (C.A. 10). But that case was a habeas corpus proceeding, in which a sentence was being subjected to collateral attack. Perhaps a sentence entered by another Judge is not so void that it must be upset on habeas corpus; but where such a sentence is challenged on a direct appeal—as was done in this case—it should be overturned. For, as the Court below noted in the very same case it used as authority: "• • • *ordinarily* sentence should be imposed by the judge before whom the conviction was had • • •." *Owens* v. *Hunter, supra,* at 972. (Emphasis added).

B. *Rule 32(a).* Rule 32(a) provides that "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment". The language of the Rule appears plainly to impose the obligation to afford this opportunity to a defendant *on the court.*[26] And there is nothing in the Rule which suggests

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[25] The Tenth Circuit itself has used the phrases "trial" and "accept a plea of guilty" interchangeably. *Donnelly* v. *United States,* 185 F. 2d 559, 561, *cert. den.* 340 U.S. 949.

[26] This is recognized in the Judgment and Commitment Form, which recites, "• • • *and the court having asked* the defendant whether he has anything to say why judgment should not be pronounced • • •" (R. 93, 107, 136-40). (emphasis added).

that this right is waived by the defendant if not demanded.

In the proceedings below Judge Ritter did not afford Petitioners this opportunity. His sentences were swift and inexorable; and there was no opportunity for the Petitioners to make a statement, nor for their counsel to request the opportunity for them to do so. When the matter was raised before the Court below, that Court held that "it does not, however, follow in all cases that a failure by the Court to ask defendant if he has any statement to make results in a violation of the rule or denial of due process" (App. A, Joint Appendix, p. 14); and refused to hold this to be an error in the sentencing proceedings.

The Court below relied upon the fact that counsel did not affirmatively request an opportunity to make a statement.[27] But the bare record in this case clearly conveys the unseemly haste and singleness of purpose in the sentencing proceedings (R. 480-7), making it futile for counsel to make their requests of record. The sentencing was almost finished before it was begun; and to hold counsel rather than the court to account for what transpired amidst such speed and confusion is to invite and condone disregard of the Rule's explicit requirement. The Rule, after all, lodges the burden on the court—and it is not for the court, in turn, to pass its burden on to counsel. Cf., *United States* v. *Sandroff*, 174 F. 2d 1014, 1020, *cert. den.* 338 U.S. 947.

* * *

The Federal Rules of Criminal Procedure govern the trial of criminal cases in the district courts of the United States. See *Bryan* v. *United States*, 338 U.S. 552, 558.

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[27] The cases cited by the Court below do not justify such reliance. In *Shockley* v. *United States*, 166 F. 2d 704, 717 (C.A. 9), *cert. den.* 334 U.S. 850, this issue was grouped together with a number of others which the Court dismissed summarily without discussion of why they lacked merit; and *Savage* v. *District of Columbia*, 54 A. 2d 562, 569 (Mun. Ct. App. D.C.) dealt with a misdemeanor under the Rules of the Municipal Court for the District of Columbia and not a felony under the Federal Rules of Criminal Procedure.

They have the "effect of law". *Ochoa* v. *United States*, 167 F. 2d 341, 345 (C.A. 9). Since they establish the procedure which protects individual rights, there should be clarity and precision in their application. Corrosion of their purpose, looseness in their application—no matter how creeping and slight—should not be tolerated; and only this Court has the power to effect full and uniform adherence to their requirements.

VII

In Question 9, Questions Involved, p. 4, *supra*, we have raised the issue whether the points raised under Questions 2, 3, 4, 7 and 8 when taken together do not so taint the proceeding in their cumulative effect as to constitute a denial of due process even though, when examined "standing alone", they may not in and of themselves require reversal.

We think this Court has already answered this question and therefore only recall the admonition contained in *Kotteakos* v. *United States*, 328 U.S. 750, 765:

> "if one cannot say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FILED
MAR 7 19
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954

No. 548

EUGENE SMALDONE and CLYDE SMALDONE, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

JAMES F. FOGARTY, HERBERT C. FREEMAN, CHRISTIAN A. JOHNSON, DAVID G. MCCORNACK, JOHN H. ECCLES and HUGH B. BAKER,

Petitioners,

against

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, defendants in this plenary action commenced against them by respondents, as plaintiffs, in the District Court of the United States for the Southern District of New York, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, reversing a judgment of the United States District Court for the Southern District of New York which granted petitioners' applications, made in this action pursuant to a statute of the State of New York,[1]

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[1] Article 6-A, secs. 64-68, General Corporation Law of New York; 22 McKinney's Consol. Laws c. 23; L. 1945 c. 869, in effect April 18, 1945.

for the assessment of their reasonable expenses, includin attorneys' fees, incurred by petitioners in their succes ful defense of this action. The Court of Appeals directe dismissal of petitioners' applications for lack of jurisdi tion in the District Court, without prejudice to renewal o the application in the United States District Court fo the Eastern District of Virginia, where the debtor, Cen tral States Electric Corporation, has been in proceeding for reorganization under Chapter X of the Bankruptc Act.[2]

Opinions Below

Both the original opinion and the opinion on reargumen of the Court of Appeals (Clark, Hincks, and Harlan, Circui Judges) are reported in 216 F. 2d 278. The opinion of th Dis'rict Court (Weinfeld, D. J.) granting petitioners' appli cation for the assessment of their reasonable expenses i printed at page 75a of the Consolidated Appendix in th Court of Appeals and is reported in 120 F. Supp. 900 Copies of the opinions of the Court of Appeals are printed in the Appendix to this petition.

Jurisdiction

Jurisdiction of this Court is invoked under Sec. 1254(1) of the Judiciary Code.[3] The judgment of the Court of Appeals after reargument was entered October 19, 1954. The order granting rehearing was made July 23, 1954.

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[2] 11 U.S.C.A. secs. 501-676; Act of June 22, 1938, as amended, 52 Stat. 839, as amended.

[3] 28 U.S.C.A. sec. 1254(1); Act of June 25, 1948, sec. 1, 62 Stat. 869.

Questions Presented

1) Where a district court has jurisdiction under Chapter II, Sec. 2a(7) of the Bankruptcy Act[4] of a plenary action brought by trustees of a debtor corporation in reorganization under Chapter X of the Bankruptcy Act against defendants, residents of the state in which the district court sits, to enforce rights created by the laws of that state, and the action is dismissed on the merits as against such defendants, does the district court in which the action was brought and determined also have jurisdiction of applications, pursuant to the laws of the state, for the assessment of the defendants' reasonable expenses, including attorneys' fees, incurred in their successful defense of the action?

2) Does the decision of the Court below conflict with the earlier decision of the same Court in *Austrian, et al., Trustees* v. *Williams, et al.* (Swan, Augustus N. Hand, and Clark, Circuit Judges) 159 F. 2d. 67, and of the decision of this Court in *Williams, et al.* v. *Austrian, et al., Trustees* (Justices Frankfurter and Jackson dissenting), 331 U. S. 642, sustaining the jurisdiction of the District Court for the Southern District of New York over this plenary action under Chapter II, Sec. 2a(7) of the Bankruptcy Act?

3) Do the provisions of Chapter II, Section 2a, particularly sub-divisions (2), (7), (15) and (18), and 2b of the Bankruptcy Act[5] confer jurisdiction upon the District Court for the Southern District of New York to hear and determine petitioners' applications for assessment of their

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[4] 11 U.S.C.A. sec. 11(a)(7); as amended July 7, 1952, c. 579, sec. 2, 66 Stat. 420.

[5] *Supra*, note (4).

reasonable expenses, including attorneys' fees, incurred in their successful defense of this action?

4) Do the expenses incurred by defendants, former officers or directors of a debtor corporation, in the successful defense of this action constitute "costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization" of the debtor corporation within the meaning of Sec. 221(4) of the Bankruptcy Act?[6]

5) Where the final judgment of the District Court for the Southern District of New York, dismissing this action on the merits, as against petitioners, as defendants, included a reservation of jurisdiction for the purpose of "assessing costs and expenses of the parties" and that District Court has granted a further supplemental judgment awarding these petitioners their reasonable expenses incurred in the successful defense of this action which contained no direction for the enforcement or payment thereof, the Court saying "That is a matter for the Bankruptcy Court [*i.e.* the District Court for the Eastern District of Virginia].", do the provisions of Section 111 or Section 221(4) of Chapter X of the Bankruptcy Act,[7] or the decisions of this Court in *Brown* v. *Gerdes*, 321 U. S. 178, or *Leiman* v. *Guttman*, 336 U. S. 1, prevent the District Court for the Southern District of New York from having jurisdiction to determine petitioners' applications for such expenses and confer exclusive jurisdiction of such applications on the District Court for the Eastern District of Virginia?

6) Do the provisions of a state statute providing for the assessment against a corporation doing business in

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[6] 11 U.S.C.A., sec. 621(4); 52 Stat. 897.

[7] 11 U.S.C.A., secs. 511, 621(4); 52 Stat. 884, 897.

the state for litigation expenses incurred by defendants in the successful defense of an action in which such defendants were made parties by reason of the fact that they were formerly directors of such corporation, condition the state-created rights attempted to be enforced in such action and are they, therefore, applicable in the federal district court under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541?

7) Where, after a plan of reorganization of the debtor corporation has been confirmed and a separate fund has been set aside for the expenses in connection with a plenary action, does the district court in which such action has been tried and determined have jurisdiction to grant allowances to the successful defendants, pursuant to a state statute, for their reasonable expenses and direct judgment therefor without including therein any direction for payment?

8) Did the Circuit Court of Appeals err in reversing the judgment and decision of the District Court granting petitioners allowance for their expenses and affirming the District Court's order vacating a separate judgment in favor of petitioners Fogarty and Freeman?

The Statutes

The statutory authorization for this plenary action against petitioners, as former officers or directors of the debtor Central States Electric Corporation, and for the bringing of this action by the respondents, as trustees in bankruptcy of the debtor corporation, are found in the provisions of Article 6, Sections 60 and 61 of the General Corporation Law of New York; McKinney's Consol. Laws, c. 23; L. 1929, c. 650, as amended L. 1944, c. 727 and L. 1946, c. 162. The petitioners' applications for assess-

ment of their reasonable expenses incurred in the succes
ful defense of this action were made pursuant to the pro
sions of Article 6-A, Sections 64-68 of the General Corpor
tion Law of New York; McKinney's Consol. Laws, c. 2
L. 1945, c. 869, §4, in effect April 18, 1945. The pertine
provisions of the Bankruptcy Act relating to the juri
diction of the District Courts of the United States
courts of bankruptcy are in Chapter II, Section 2 of t
Bankruptcy Act, 11 U. S. C. A., Section 11, as amend
by the Act of July 7, 1952, c. 579, §2, 66 Stat. 420. T
pertinent provisions of the Bankruptcy Act relating
reorganizations of debtor corporations, plans of reorga
zation and the powers of a district judge of the distri
court in which such reorganization proceedings are pen
ing are in Chapter X of the Act, 11 U. S. C. A. 501-67
Act of June 22, 1938, 52 Stat. 839. The foregoing statuto
provisions being lengthy, their pertinent texts are s
forth in an appendix to this petition.

Statement of the Case

Central States Electric Corporation is a Virginia co
poration and was doing business at an office in New Yo
until on February 23, 1942, a petition for its reorganizati
as a debtor under Chapter X of the Bankruptcy Act w
filed in the United States District Court for the Easte
District of Virginia. An order approving the petition w
entered February 27, 1942. The respondents were a
pointed successor trustees of the debtor corporation up
the resignation of the original trustees.

After an extensive investigation of the affairs of t
debtor corporation,[8] with the approval and authoriz

[8] The investigation was made pursuant to the decision in *Co*
mittee for Holders, etc. v. *Kent, et al., Trustees,* 143 F. 2d 684 (C.C.
4th, 1944).

tion of the District Court in Virginia, respondents commenced this plenary action in July, 1945, against petitioners and others to recover approximately $30,000,000 as the amounts claimed to be due the debtor corporation by reason of the alleged failure of petitioners and others to perform their fiduciary duties as officers or directors of the debtor corporation in relation to thirteen separate transactions, all of which took place during the years 1922 through 1938 in New York.

Petitioners are residents of New York and were either officers or directors of the debtor corporation for different terms during the above-mentioned period.

The debtor corporation, as a foreign corporation doing business in New York, could have maintained this action against petitioners and the other defendants, upon authorization of the reorganization court, either in the state court in New York or in the District Court for the Southern District of New York, and the jurisdiction of the latter Court could have been grounded upon the diversity of citizenship of the parties.

However, in the complaint, respondents, as plaintiffs, did not allege facts showing diversity of citizenship, but relied upon the federal constitutional and statutory provisions relating to bankruptcy as grounds for jurisdiction of this plenary action in the District Court in New York.

Petitioners and other defendants thereupon moved in the District Court in New York for judgment dismissing the complaint for failure to state facts requisite to confer jurisdiction on that District Court, pointing out the absence of allegations showing diversity of citizenship. The District Court granted petitioners' motion and dismissed the complaint for lack of jurisdiction (*Austrian* v. *Williams*, 67 F. Supp. 223, Leibell, D. J.). On appeal by respondents to the Court of Appeals for the Second

Circuit, the judgment of the District Court was reversed and the jurisdiction of the District Court was sustained, the Court of Appeals having construed the provisions of Section 2a(7) of the Bankruptcy Act[9] as sufficiently broad to confer upon the District Court in New York, as a bankruptcy reorganization court, jurisdiction over this plenary action (*Austrian* v. *Williams*, 159 F. 2d 67, Swan, Hand and Clark, Circuit Judges). Petitioners and other co-defendants applied to this Court for a writ of certiorari, which was granted (330 U. S. 813), and on review by this Court the determination of the Court of Appeals was sustained (*Williams, et al.* v. *Austrian et al., Trustees, supra*).

Thereafter petitioners and other co-defendants moved in the District Court at a term for motions for judgment dismissing the action upon the ground that it was barred by the New York Statute of Limitations. Those motions were denied without prejudice to renewal before the trial court (*Austrian* v. *Williams*, 80 F. Supp. 437, Coxe, D. J.). That order, not being a final determination, was not appealable.

The action was tried in the District Court in November and December of 1951 and after a lengthy trial, on March 7, 1952, judgment was entered dismissing the action on the merits as against petitioners and granting a partial judgment in favor of respondents and against the co-defendants Williams and Kilmarx[10] (*Austrian, et al.* v.

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[9] *Supra*, note (4).

[10] The co-defendant Williams was not a director of the debtor corporation, but was the holder of a majority of the outstanding common stock of the corporation. The complaint charged, among other things, that Williams dominated and controlled the debtor corporation and its officers and personally profited in certain transactions of the debtor corporation. The co-defendant Kilmarx was a director of the debtor corporation from March 22, 1922 until the filing of the petition for the reorganization of the debtor and held various offices, including the office of President from March 6, 1923 to July 3, 1929 and Vice President from July 3, 1929 to the filing of the petition for reorganization.

Williams, et al., 103 F. Supp. 64, original opinion, January 10, 1952, by Weinfeld, D. J.).

The District Court held that respondents had failed to prove the greater part of the thirteen separate transactions as against petitioners and that the claims based upon the remaining transactions were barred by the New York Statute of Limitations.[11] The judgment of dismissal included, among others, the following provision:

> "11. The parties hereto may hereafter apply herein to this Court for such further orders and directions as may be just and proper in connection with costs, expenses and allowances, and with the enforcement, adjustment and satisfaction of this judgment and decree, and the Court retains jurisdiction for such purpose."

Respondents did not appeal from any part of the judgment of dismissal on the merits in favor of these petitioners.

However, the co-defendants Williams and Kilmarx appealed from the partial judgment against them and on that appeal the Court of Appeals reversed the judgment of the District Court and held that the claims against those co-defendants were also barred by a proper application by the District Court of the New York Statute of Limitations, as construed by the appellate courts of New York (*Austrian, et al.* v. *Williams, et al.*, 198 F. 2d. 697, Swan, Chief Judge and Chase, Circuit Judge; Clark, Circuit Judge, dissenting). Certiorari was denied by this Court[12]

On the mandate of the Court of Appeals, the District Court entered a judgment in favor of the co-defendants Williams and Kilmarx and, in accordance with the mandate, included, among other things, a direction for judg-

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[11] 103 F. Supp. 67, at p. 117.

[12] 344 U. S. 909.

ment in favor of such co-defendants for costs in the amount of $3,686.65.

Following the conclusion of the foregoing proceedings and appeals, and exercising their rights under the reservation of jurisdiction in paragraph 11 of the judgment of dismissal, quoted above, these petitioners made application in this action pursuant to the provisions of Article 6-A, Secs. 64-68 of the General Corporation Law of New York,[13] for the assessment in this action of their reasonable expenses incurred in their successful defense of this action. These applications were heard and granted by the District Court (*Austrian, et al.* v. *Williams, et al.*, 120 F. Supp. 900, August 21, 1953, Weinfeld, D. J. (R. 75a)).[14]

By an order dated October 17, 1953, the Court assessed the petitioners' expenses against the debtor, Central States Electric Corporation, in varying amounts aggregating $41,000, as attorneys' fees, and $1,185.53 as disbursements of petitioners Fogarty and Freeman, or a total of $42,185.53 (R. 90a).

On application to the Clerk of the District Court, a separate judgment was entered November 4, 1953, in favor of petitioners Fogarty and Freeman for the total amount of $31,185.53, with interest thereon, at the rate of 6% per annum from March 7, 1952, the date of the entry of the final judgment in this action in favor of petitioners dismissing the complaint on the merits, said interest amounting to $3,111.29, or for the total sum of $34,296.82 (R. 91a). Petitioners Fogarty and Freeman appealed from the order of the District Court vacating that separate judgment (R. 115a).

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[13] *Supra*, note (1).

[14] References are to pages of the Consolidated Appendix in the Court of Appeals.

Respondents appealed to the Court of Appeals for the Second Circuit. That Court, relying upon the decisions of this Court in *Brown* v. *Gerdes*, 321 U.S. 178 and *Leiman* v. *Guttman*, 336 U. S. 1, held that the District Court was without jurisdiction to determine the applications of petitioners and directed that the applications be dismissed, without prejudice to renewal in the District Court for the Eastern District of Virginia which was held to have exclusive jurisdiction over the petitioners' applications for allowances, even though made under the New York Statute which requires that the applications be made "in the action" or if not so made, then by a special proceeding in the Supreme Court of New York (*Austrian, et al., Trustees* v. *Williams, et al.*, 216 F. 2d 278, Clark, Hincks and Harlan, Circuit Judges).

Petitioners requested reargument of the appeal, pointing out that the question of jurisdiction had not been raised or argued on the original appeal and that the decision of this Court in *Brown* v. *Gerdes, supra*, involved allowances for attorneys of trustees in reorganization, and in *Leiman* v. *Guttman, supra*, allowances to an attorney for a committee of security holders, both of which allowances were under the exclusive jurisdiction of the judge of the Bankruptcy Court where the petition for reorganization was filed, as expressly provided in Section 221(4) of the Bankruptcy Act,[15] and also urging that the decision of the Court of Appeals conflicted with the earlier decision of the same Court of Appeals and of this Court sustaining the jurisdiction of the District Court in New York over this plenary action under the provisions of Section 2a(7) of the Bankruptcy Act (*Austrian* v. *Williams, supra*, opinion by Clark, C. J., 159 F. 2d. 67, aff'd

[15] 11 U.S.C.A. sec. 621(4), Act of June 22, 1938, c. 575 sec. 1, 52 Stat. 897.

Williams, et al. v. *Austrian, et al., Trustees, supra,* 331 U. S. 642).

Reargument was granted and after reargument, the Court of Appeals adhered to its original decision holding that the prior decisions sustaining jurisdiction of the District Court over this plenary action did not "reach the question" of the District Court's jurisdiction over petitioners' applications for assessment of expenses.[16]

In the opinion on reargument the Court further held that petitioners' expenses arising out of this action were "in connection with a plan and incident to the reorganization" of the debtor corporation and were "fixable after confirmation of the plan" and were, therefore, "subject to the approval of the [reorganization] judge".[17] The Court also made specific reference to the provisions of Section 221(4) of the Bankruptcy Act[18] which had not been mentioned in the original opinion.

Although the Court noted in its original opinion that the plan of reorganization of the debtor "has been finally approved and consummated *except* for the winding up of the action against the Central States directors * * *" and that "Funds were also reserved in the hands of the Trustees to provide for 'allowances and expenses * * * in retaining and enforcing the contingent assets of the Estate, and in distributing the proceeds thereof'," the Court indicated in its opinion on reargument that the allowance of petitioners' expenses "may have an impact upon the administration of an estate or a plan of reorganization" and that, therefore, it would not follow from the filing of this suit in the New York District Court that

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[16] 216 F. 2d 278, at p. 283.

[17] 216 F. 2d, 278, at pages 284-285.

[18] *Supra*, note (15).

such Court would have jurisdiction to determine the liability for petitioners' expenses. The Court further added that it did not mean to express any view as to the validity of petitioners' state-created right to reimbursement for their litigating expenses or the enforceability of that right "in a federal court of competent jurisdiction." The Court adhered to its original decision, saying "only the Reorganization Court has jurisdiction to determine and enforce the right to reimbursement".

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has decided an important question of substantive federal law relating to the distribution between different federal district courts of the judicial powers conferred by the provisions of the Bankruptcy Act, which has not been, but should be, decided by this Court.

The decision below accomplishes two important jurisdictional determinations, (1) it withdraws from the jurisdiction of the Southern District Court in New York the power to hear and determine petitioners' applications for their litigation expenses and render judgment therefor, although the District Court made no provision for the enforcement thereof, the District Court holding that a matter for the Virginia District Court; and (2) it purports to confer exclusive jurisdiction of petitioners' applications on the District Court in Virginia, which authorized the filing of this action in New York and which has approved a plan for the reorganization of the debtor and set aside a fund for the

expenses of this litigation. Thus, a Court of Appeals in one circuit (*i.e.* the Second Circuit) has undertaken to decide not only the jurisdictional powers of a district court in its circuit, but also the jurisdictional powers of another district court in a different circuit. The latter determination, of course, is not binding on the Virginia District Court or the Court of Appeals for the Fourth Circuit. This, we respectfully submit, is a matter calling for decision by this Court.

The reversal by the Court below of the judgment of the New York District Court is based solely on the fact that a reorganization plan for the debtor corporation has been approved in another district court. But there is absent here any showing that the determination of petitioners' applications for their litigation expenses is governed by any provision of the Bankruptcy Act, or that it has interfered with the administration of the debtor's estate in the Virginia Court, or has affected the plan of reorganization in any material way, or that the amounts of petitioners' expenses as fixed by the New York Court exceed the amount of the fund set aside for expenses of this action by the Virginia Court. The decision below, therefore, was made upon an important question of the law governing the jurisdiction of the district courts in different circuits which calls for an authoritative interpretation of a federal statute by this Court.

In *Callaway* v. *Benton*, 336 U. S. 132, at page 142, this Court has said: "There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." There, the question was whether a federal bankruptcy court in which a debtor railroad corporation was in reorganization under Section 77b of the Bank-

ruptcy Act [19] could enjoin an action in a state court by the stockholders of another corporation which, though the lessor of the debtor's leased properties, was not in reorganization. Similar situations were considered by this Court in *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132 and *Gardner* v. *New Jersey*, 329 U. S. 565. This Court has also said [20] that "Even when the controversy involves property within the exclusive jurisdiction of the bankruptcy court, that court may, in its discretion, postpone action pending adjudication of the question in another court," citing *Ex parte Baldwin*, 291 U. S. 610; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Foust* v. *Munson S. S. Lines*, 299 U. S. 77; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168.

The issue here does not involve the question of the conflicting jurisdictions of state courts and federal courts on which this Court has written extensively, but it does present an important question of the application in the federal courts of a state law to state-created rights and the further question of the restrictions and limitations of the respective jurisdictions of different federal district courts under the powers conferred under the Bankruptcy Act.

Since the decision of this Court in *Williams, et al.* v. *Austrian, et al., Trustees, supra,* [21] sustaining the jurisdiction of the New York District Court over this plenary action under Section 2a(7) of the Bankruptcy Act, [22] there has been no decision of this Court which clarifies the re-

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[19] 49 Stat. 911; 11 U.S.C., Sec. 205.

[20] 336 U. S. 132 at p. 142, footnote (11).

[21] 331 U. S. 642.

[22] 11 U.S.C.A., Sec. 11, 30 Stat. 545, as amended 52 Stat. 842, 66 Stat. 420.

spective jurisdictions of different district courts as bankruptcy reorganization courts, in situations such as presented here. One District Court, as a bankruptcy reorganization court, having jurisdiction of the estate of a debtor corporation which conducted its business in another jurisdiction, appointed Chapter X trustees of the debtor corporation and authorized the trustees to bring suit in another District Court and the jurisdiction of such suit is founded upon the broad powers of Section 2 of the Bankruptcy Act, notwithstanding that the matter in suit involved state-created rights, and the defendants are all residents of such state. The action has been determined on the merits against the trustees by the local District Court according to the state law, thereby creating a liability of the debtor's estate under the state law for the litigation expenses of the successful defendants which, by the terms of the state law, must be assessed "in the action" and the local District Court, on applications addressed to it, has determined the amount of such expenses without provision for payment, in deference to the reorganization court.

One of the important questions raised by the decision below is whether in the disposition of the local action (which, of course, was a determination of one of the "controversies" in relation to the bankrupt's estate within the provisions of Section 2a(7) of the Bankruptcy Act), the powers and functions of the local District Court, as a court of bankruptcy, are substantially the same as they would be in cases where the jurisdiction of the local District Court is founded upon the diversity of citizenship of the parties.

Throughout the long history of this "unusually complicated case,"[23] beginning with the decision of the Court of

[23] See *Austrian* v. *Williams*, 103 F. Supp. 64 at p. 69, footnote to opinion of District Judge Weinfeld.

Appeals for the Fourth Circuit, overruling an order of the reorganization court which approved the recommendations of the original trustees against the filing of this suit,[24] and at every subsequent stage of this action, the most diligent effort has been made by the present trustees to have this controversy determined upon federal equity doctrines, primarily to avoid the application in the New York District Court of the state law, including the state statute of limitations. In the determination of this action that effort has failed completely.[25] Nevertheless, that same effort has been continued in opposing the petitioners' applications and it is reflected in the decision and original opinion of the Court below: "the State statute must yield to the supremacy of the bankruptcy laws."[26]

Unlike the opinion of this Court in its earlier decision in *Williams, et al.* v. *Austrian, et al., Trustees, supra,* the decision of the Court below does not disclose any analysis of the problem of state law in the federal courts or a comparison of the provisions of Chapter II, Section 2, and Chapter X, Section 221(4) of the Bankruptcy Act. Such an analysis, we submit, is essential to a proper determination of the respective powers and functions of the local District Court in making the assessments of petitioners' expenses and of the judge of the Reorganization Court in approving the plan of reorganization.

Chapter II, Section 2 is the important provision of the Bankruptcy Act which creates the courts of the United States "as courts of bankruptcy" and vests them in proceeding under the Act "with such jurisdiction at law and

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[24] *Committee for Holders, etc.* v. *Kent, et al., Trustees,* 4th Cir. 143 F. 2d 684 at p. 685.

[25] See *Austrian* v. *Williams,* 2nd Cir., 198 F. 2d, 697; cert. den'd, 344 U.S. 909.

[26] 216 F. 2d 278 at p. 285.

in equity as will enable them to exercise original jurisdi tion" in twenty-one separately defined specific matter These include, among others, the power to "(2) Allo claims * * *; (3) * * * commence and prosecute an suit or proceeding in behalf of the estate before an judicial * * * tribunal in any jurisdiction * * * (7) Cause the estates of bankrupts to be collected, re duced to money and distributed, and determine contro versies in relation thereto, except as herein otherwis provided * * *; (15) Make such orders * * * an enter such judgments * * * as may be necessary fo the enforcement of the provisions of this Act * * * (18) Tax costs and render judgments therefor agains the unsuccessful party * * * and against estates, i proceedings under this Act; * * *."

That the broad scope of the powers is not limited b the twenty-one specifically designated powers is indicate by subdivision b of Section 2 which reads: "b. Nothin in this section contained shall be construed to deprive court of bankruptcy of any power it would possess wer certain specific powers not herein enumerated."

Chapter X contains the provisions relating to the filin of petitions for reorganization of debtors and the approva of plans for reorganization. The particular section t which the present controversy relates is Section 221.[27]

The present controversy has to do with the provision of subdivision (4) of this section.

In the performance of the function of the district courts as courts of bankruptcy in plenary actions, and of th judge of a reorganization court in confirming a plan unde Section 221, it is, of course, of the greatest importanc that all the district courts shall have the benefit of a con trolling decision of this Court for their guidance.

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[27] (11 U.S.C.A., §621). The complete text is printed in th Appendix at page 37.

The provisions of Section 2 have been a part of the Bankruptcy Act since 1867.[28] It was continued in substantially the same language in the Act of 1898.[29] Chapter X did not become a part of the Bankruptcy Act until the Chandler Act of 1938,[30] which generally revised the 1898 Act and made Section 23 inapplicable in reorganization proceedings under Chapter X unless an order is entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VIII, inclusive.[31]

The determination by a controlling decision of this Court should include answers, among others, to the following questions:

Are such litigation expenses of the successful defendants actually "expenses in connection with" the reorganization proceeding or plan of reorganization within the meaning of subdivision (4) of Section 221?

May the judge confirming a plan under Section 221 be "satisfied" regarding the payments specified in subdivision (4) only if that judge conducts the hearing and makes the determination on all controversial applications for payments which are a charge against the assets of the debtor corporation; or may that judge be "satisfied", within the meaning of Section 221, where another district court, as a bankruptcy court, has heard and made a judicial determination of applications for litigation expenses of successful defendants in defending an action instituted by the trustees in such other district court which has also tried the action and in that action made the determination regarding the liability of the trustees for such expenses and the reasonable amount thereof?

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[28] In the Act of 1867 it was Sec. 1, 14 Stat. 517.

[29] 30 Stat. 544, as amended.

[30] 52 Stat. 840.

[31] Section 102 of the Act; 11 U.S.C.A., sec. 502, 52 Stat. 883.

A literal reading of subdivision 4 of Section 221 does not embrace such expenses, nor require the judge of the reorganization court to take over the function and the burden of hearing and determining a petition for successful defendants' expenses which obviously can be determined more accurately and fairly by the district court in which the action was tried. Comity between federal district courts should suffice to enable the judge of the reorganization court to accept the determination of another district court, also sitting as a court of bankruptcy, and thereby meet any requirements for the satisfaction and approval by the judge of the reorganization court, both as to the legal liability of the debtor's estate for such expenses and reasonableness thereof.

The decisions of this Court on which the Court below relied are *Brown* v. *Gerdes*, 321 U. S. 178 and *Leiman* v. *Guttman*, 336 U. S. 1.

Brown v. *Gerdes* involved the question whether the fees of attorneys employed to represent a debtor's estate in litigation in a state court could be fixed by that court or the federal bankruptcy court where the debtor corporation was in reorganization under Chapter X. Both the New York Court of Appeals (290 N. Y. 468) and this Court held that under Section 221(4), as well as Section 241(3)[32] of Chapter X of the Bankruptcy Act, the federal court had exclusive jurisdiction. The opinion of this Court (by Justice Douglas) includes a full discussion of the history and the purposes of Chapter X and the "detailed machinery governing all claims for allowances from the estate" contained in Chapter X. But the issue decided in *Brown* v. *Gerdes* was whether the state court or the federal bankruptcy court was vested with power to fix the fees

[32] 11 U.S.C.A., Sec. 641, 52 Stat. 900.

of attorneys employed by the debtor's estate. The ruling of this Court was that under the Constitutional power (Art. I, Sec. 4) to establish uniform laws on the subject of bankruptcies throughout the United States, Congress had conferred sole jurisdiction on the judge of the federal bankruptcy reorganization court. The case involved no question regarding the distribution of bankruptcy powers between two federal district courts or the expenses of defendants in the successful defense of a plenary action against them by a Chapter X trustee in a federal district court.

Likewise, *Leiman* v. *Guttman, supra,* involved claims for services of the attorneys for a stockholders' protective committee in connection with the reorganization of a debtor under Chapter X of the Bankruptcy Act. Payments for such services are, of course, plainly within the provisions of Sections 242(1) and (3) and 221(4)[33] as payments for services in connection with the reorganization proceeding and incident to the reorganization, as well as the plan, and were, therefore, within the jurisdiction of the judge of the district court, irrespective of the fact that the actual payment was to be made from a source other than the debtor's estate.

It is pertinent here to note that in the opinion in the *Leiman* case, this Court said (336 U. S. 1, at p. 9):

> "• • • Moreover, it is the bankruptcy court that is in the best position to know what work was done by the fee claimant, how important and involved it was, how much it benefited the whole group of security holders and how much it benefited the one class alone, how much of it was necessary, how much of it was effective. That court has already determined what the estate should pay. The ques-

[33] 11 U.S.C.A., Secs. 621 and 642, 52 Stat. 900.

tion that remains is how much of a charge should
made against the escrowed stock and whether t
state court or the bankruptcy court should determi
what that charge should be. Certainly where, as
this case, the services benefited in part the esta
and in part one class of security holders, it is t
bankruptcy court that is in the position to weig
the interrelated issues of fact and make a fair a
location between the two.

"These practical considerations support the li
eral reading of §221(4) that it is the bankrupt
court that has jurisdiction to pass on these fee
Its jurisdiction is therefore exclusive. See *Brou*
v. *Gerdes, supra.*"

There is, we submit, a striking similarity in the reaso
ing of the District Judge in rejecting the trustees' co
tention that the fixing of allowances by the New Yor
District Court would be an invasion of the bankrupt
powers of the Virginia reorganization court. In the opi
ion by Judge Weinfeld it was said (R. 88a):

"• • • This Court is entirely familiar with th
services for which reimbursement is sought and ca
more readily appraise their value than a Court no
so situated and which would be compelled to rel
upon extensive affidavits. Moreover, this Cour
having conducted the trial, can make its appraisa
upon its own knowledge, without extended proof,
course which would be inevitable were the proceed
ings brought in the Bankruptcy Court. No vali
reason exists for imposing such a burden upon th
Bankruptcy Court or the applicants. Presumabl
the New York statute provides for the making o
the application in the action because of these con
siderations."

The reasons stated by the District Court in New Yor
to sustain its jurisdiction appear to be fully in accord wit

the views expressed by Justice Douglas, writing for this Court in the *Leiman* case.

There is, therefore, a serious doubt whether in reversing the District Court the Court below properly interpreted this Court's decisions in the *Leiman* case and in *Brown* v. *Gerdes*.

On the reasoning of the Court below, basing its decision, as it does, on Section 221 (4) of the Bankruptcy Act and the *Leiman* case, the amounts which petitioners would be required to pay out of their own funds for their own counsel in defending this plenary action would have to be passed upon by a judge of the reorganization court, regardless of any right of reimbursement for such expenses. By adopting the view that such expenses are an "incident" of a reorganization plan, the decision below means that any expenses incurred by defendants in any plenary suit brought by a Chapter X trustee necessarily requires the approval of the reorganization judge as a condition of their payment, even though not payable out of the debtor's estate.

Moreover, if the decision of the Court below is permitted to stand, the litigation expenses for the defense of a plenary suit brought by Chapter X trustees, although involving entirely different issues of fact and law, will have to be treated in the same forum and in the same manner as expenses incurred in connection with a reorganization plan. This would not only impose an additional burden upon the judge of the reorganization court, but would require that judge to make a determination which, as a practical matter, the court in which the plenary suit was brought is uniquely qualified to make.

II

The Court of Appeals has decided a federal question in a way which conflicts with the decision of this Court in *Williams, et al.* v. *Austrian, et al., Trustees*, 331 U. S. 642.

The Court of Appeals, particularly in its original opinion, has overlooked that in *Williams, et al.* v. *Austrian, et al., Trustees, supra*,[34] this Court dealt fully with the question of the jurisdiction of the District Court in New York over this plenary action and that this Court sustained the jurisdiction of that Court under the broad provisions of Section 2a(7) of the Bankruptcy Act. There, referring to the absence of allegations showing diversity of citizenship of the parties as the basis for federal jurisdiction and reviewing the provisions of the Bankruptcy Act, this Court said (331 U. S. at pp. 657-658):

> "• • • Congress intended by the elimination [from reorganization proceedings] of §23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking.
>
> "The decision of the Circuit Court of Appeals is in entire harmony with the foregoing considerations. The language of §2, in its ordinary sense and no longer limited by §23, easily comprehends the present type of suit; • • • Since all reorganization courts are the objects of the jurisdiction conferred by §2, the District Court for the Southern District of New York has jurisdiction to hear the present suit, • • •"

And, further, at pp. 660-661:

> "• • • Because of the countrywide ramifications of corporate debtors placed in Chapter X re-

[34] 331 U.S. 642.

organization, it is as usual as not for the trustee to resort to foreign jurisdictions for the disposition of plenary suits. Allowing the primary court to hear these suits will not change this situation, if it is true that the process of a reorganization court does not run nationwide in plenary cases * * *.

"Our holding is, of course, that Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts. * * * But the exception to §2a(7) acknowledged the overriding limitations of §23, which was the embodiment of Congressional policy to exclude from the bankruptcy courts many of the trustee's plenary suits. * * * The failure to provide appropriate fanfare for the suspension of §23 in Chapter X cases, and for the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken. Judicial drives to limit the jurisdiction of federal courts should not lead to decision falling short of complete effectuation of statutory scheme. With the limitations of §23 suspended, §2 confers jurisdiction upon all reorganization courts to hear plenary suits brought by a Chapter X trustee."

* * *

We respectfully submit that upon a fair reading of this Court's opinion on the issue of jurisdiction of the District Court in New York in the above case, especially in the light of the strong dissenting opinion of Justice Frankfurter, the reasonable inference is that the District Court in New York is authorized under Section 2 of the Bankruptcy Act to exercise plenary jurisdiction to the same extent as if jurisdiction had been founded upon diversity of the citizenship of the parties. We further submit that nothing held by this Court in *Williams* v. *Austrian* indicates any restriction on the power of the District Court

in New York to exercise all the necessary jurisdiction to hear and determine each and every part, as well as every incident of this plenary action, including the incident of petitioners' applications for assessment of their expenses incurred in the successful defense of such plenary action.

The decision below cannot, we submit, be reconciled with the earlier decision of this Court and of the Court of Appeals sustaining the jurisdiction over this plenary action under Section 2 of the Bankruptcy Act.

III

The Court of Appeals has decided an important question of substantive federal law concerning federal and state relations in connection with plenary suits brought by Chapter X trustees which has not been, but should be, decided by this Court.

In the opinion on reargument, the Court below rejected petitioners' contention that the bringing of this suit in the Southern District Court of New York operated to confer jurisdiction on that Court to hear and determine petitioners' applications and that the state statute providing for the assessment of petitioners' expenses was a condition of respondents' right to sue. Petitioners relied upon the rationale of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. In rejecting petitioners' contention the Court below invoked the supremacy of the bankruptcy laws over the state statute.

In contrast, the earlier decision of the Court of Appeals (differently composed except for Circuit Judge Clark, who dissented) rejected the urgent contentions of the respondents that a federal doctrine of limitations, not the state law of limitations, should be applied (*Austrian* v. *Williams*, 198 F. 2d. 697, cert. den'd. 344 U. S. 909).

It can no longer be doubted that this plenary action in which petitioners' expenses were incurred involved only rights created by the laws of New York.

As was said by this Court in *National Mut. Ins. Co.* v. *Tidewater Co.*:[35]

> "* * * The only way in which any law of the United States contributed to the [*Austrian*] case was in opening the district courts to the trustee * * * *. The fact that the congressional power over bankruptcy granted by Art. I could open the court to the trustee does not mean that such suits arise under the laws of the United States; but it does mean that Art. I can supply a source of judicial power for their adjudication. The distinction is important and it is decisive on this issue."

It may be added that the New York statute also expressly authorizes trustees in bankruptcy to bring suits against directors of corporations for relief, as claimed in this action.[36]

The New York statutes[37] providing for indemnity for defendants' expenses and for the assessment thereof are substantially the same as considered by this Court in *Cohen* v. *Beneficial Loan Corp.*[38]

Following the leadership of New York, a number of other states have enacted substantially the same statutory provisions for assessment of expenses of successful defendants made parties to an action by reason of the fact that they were directors of a corporation.[39]

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[35] 337 U.S. 582, at p. 599.

[36] Secs. 60, 61 General Corporation Law of New York.

[37] Article 6-A General Corporation Law of New York.

[38] 337 U.S. 541.

[39] California General Corporation Law, §§830, 834; Maryland Corporation Law, §58; Maryland General Laws, Art. 16, §206 (corporation may demand security); New Jersey General Corporation Law, §14: 3-14; 12 Purdon's Pennsylvania Statutes, §§1322 (security for costs), 1323 (assessment); Wisconsin Stat., §1813 (1945).

As pointed out by this Court in the *Cohen* case ar previously in *Erie* v. *Tompkins*,[40] the Congressional d rection that the laws of the states are applicable in th federal courts is the Rules of Decision Act.[41]

In the extension of the *Erie* doctrine this Court ha recognized that the state laws apply even where the ju isdiction is not founded upon diversity of citizenshi (*Wichita Royalty Co.* v. *City National Bank*, 306 U. S 103, 107, an action to wind up the affairs of a Nationa Bank). And the doctrine has been applied in numerou cases in district courts and in courts of appeals exercisin bankruptcy jurisdiction.[42]

Furthermore, the Rules of Decision Act has traditionall been understood to apply in non-diversity as well as i diversity cases (*Campbell* v. *Haverhill*, 155 U. S. 610 *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S 390, 399).[43] Thus, at this date, the Rules of Decision Act as construed in the *Erie* case, would seem to be applicable to non-diversity cases, whether in law or in equity, and under *Williams* v. *Austrian*, *supra*, this would include proceedings in bankruptcy.

As shown above, there are no provisions in the Bank ruptcy Act which preclude a bankruptcy court from apply-

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[40] 304 U.S. 64.

[41] 28 U.S.C.A., Sec. 1652, 62 Stat. 944: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[42] See "The Erie Doctrine in Bankruptcy", 66 Harvard Law Review, page 1013 [April, 1953], at p. 1034, note 89.

[43] In the 1948 revision of the Judicial Code, the limitation of the Rules of Decision and to trials at common law was amended to make the Act applicable to civil suits generally, in recognition of the merger of law and equity in the federal rules of civil procedure and of the further fact that the substantive provisions of the Act had always been followed in equity (See Revisor's note at 28 U.S.C.A., §1652 (1950)).

ing the state statutory provisions allowing successful defendants their litigation expenses. Moreover, federal district courts sitting in bankruptcy have been scrupulous in having regard for state-created rights.[44]

The decision below, therefore, also presents an important question concerning federal and state regulations in connection with plenary suits brought by Chapter X trustees which has not been, but should be, decided by this Court.

IV

The Court of Appeals has decided a federal question in a way which conflicts with the decision of this Court in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541.

In the *Cohen* case, this Court had occasion to consider the applicability in the federal courts of a statute of the State of New Jersey which, as described in the Court's opinion, "makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment" (337 U. S. 541, at 543).

The New Jersey statute considered in the *Cohen* case is substantially the same as the provisions of Article 6-A of the New York General Corporation Law.

In the *Cohen* case, this Court held the constitutionality of the New Jersey statutory provision does contravene the federal Constitution and that statutes of this character are not "merely a regulation of procedure", but create "a new liability where none existed before, * * *".[45]

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[44] See *supra*, note (43) and see also 3 COLLIER, BANKRUPTCY, §603.07 (14th Ed. 1940); 4 id. §2, 70.16, 70.18, 70.19, 70.70; 3 REMINGTON, BANKRUPTCY, §1212.03 (4th Ed. 1940); 4 id. §1613; 4-A id. §1728, 1730, 1754, 1755.

[45] 337 U. S. 541, at p. 555.

In substance, the liability created by the New Jersey statute considered in the *Cohen* case is no different from the liability created and imposed by Section 64 of the New York Corporation Law.[46]

In directing the dismissal of petitioners' applications, made in this action pursuant to the state statute, the decision of the Court below is in conflict with the decision of this Court in the *Cohen* case, and for that reason the decision below should be reviewed by this Court.

CONCLUSION

The important federal questions of the respective jurisdictions of federal district courts in different circuits exercising bankruptcy powers under the Bankruptcy Act and the application of state laws in federal courts having jurisdiction of a plenary action brought by Chapter X trustees in bankruptcy to enforce state-created rights, as decided by the Court below, warrants the granting of a writ of certiorari, as prayed herein.

Respectfully submitted,

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[46] Note (1), *supra*.

APPENDIX

The Statutes

Pertinent Provisions of Article 6—General Corporation Law of New York

JUDICIAL SUPERVISION OF CORPORATION AND OF THE OFFICERS AND MEMBERS THEREOF

"§60.[47] *Action against directors or officers of corporation for misconduct.*—An action may be brought against one or more of the directors or officers of a corporation to procure judgment for the following relief or any part thereof:

"1. To compel the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

"2. To compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties.

"3. To suspend a defendant from exercising his office, for an abuse of his trust.

"4. To remove a defendant from office and to direct the filling of the vacancy in accordance with the charter and by-laws of the corporation, or, if they contain no provision therefor, in such manner as the court shall direct.

"5. To set aside a transfer of property, made by one or more directors or officers of a corporation, contrary to

[47] L. 1929 c. 650 §1, as amended L. 1944 c. 727 §1.

a provision of law, where the transferee knew the purpose of the transfer.

"6. To enjoin such a transfer where there is good reason to apprehend that it will be made."

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"§61.[48] *Who may bring such action.*—An action may be brought for the relief prescribed in section sixty of this chapter, by * * * the corporation or a creditor, receiver or trustee in bankruptcy thereof, or by a director or officer of the corporation."

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Pertinent Provisions of Article 6-A of The General Corporation Law of New York[49]

Reimbursement of Litigation Expenses of Corporate Officials

"§64. *Assessment of expenses.*—Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the

[48] L. 1946 c. 162 §1.
[49] L. 1945 c. 869 §4.

extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

"§65. *Application for payment or assessment of expenses.*—Application for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, or for assessment of expenses pursuant to section sixty-four of this chapter, may be made either (a) in the action, suit or proceeding brought in this state in which such expenses were incurred, or (b) to the supreme court in a separate proceeding. Such application shall show the disposition of any previous application made to any court. If not made in the action, suit or proceeding in which the expenses were incurred, such application shall also show reasonable cause for failure to make application in such action, suit or proceeding."

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"§67. *When award to be made.*—If after hearing an application for payment or for assessment of expenses, the court shall find that the applicant, his testator or intestate was successful in whole or in part, or that the action against him has been settled with the approval of the court, the court shall grant such application in such amount as it shall find to be reasonable, and shall make an order directing the corporation to pay to the applicant the amount awarded; provided, however, that no award

of indemnity or assessment of expenses shall be made in any case where it shall appear (i) that the law of the state of incorporation of the corporation prohibits such indemnity or assessment, or (ii) that the award would be inconsistent with any action of the stockholders or members of the corporation taken prior to and in effect at the time of the accrual of the alleged cause of action; or (iii) if there has been a settlement approved by the court, that the award would be inconsistent with any condition with respect to payment of indemnity or assessment of expenses expressly imposed by the court in approving such settlement."

"§68. *When and by whom application may be made.*— Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:

"(a) when the corporation against whom the application is made for assessment of expenses pursuant to section sixty-four or for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, is a domestic corporation or a corporation doing business in this state;

"(b) when such expenses were incurred in an action or proceeding maintained in a court in this state;

"(c) when the application is made by a resident of this state and the director, officer or employee was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred."

Appendix

Pertinent Provisions of the Bankruptcy Act

CHAPTER II

Section 2.[50] Creation of Courts of Bankruptcy and Their Jurisdiction.

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, * * *; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided

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[50] 11 U.S.C.A., sec. 11, 30 Stat. 545 as amended 52 Stat. 842, 66 Stat. 420.

for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act;

* * *

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER X

SEC. 102.[51]—The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of

[51] 11 U.S.C.A., sec. 502, 52 Stat. 883.

this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered.

Sec. 111.[52] Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

Sec. 221.[53] The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable,

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[52] 11 U.S.C.A., sec. 511, 52 Stat. 884.
[53] 11 U.S.C.A., sec. 621, 52 Stat. 897.

compatible with the interests of the creditors and stockholders and consistent with public policy.

SEC. 241.[54] The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act.

SEC. 242.[55] The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

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[54] 11 U.S.C.A., sec. 641, 52 Stat. 900.
[55] 11 U.S.C.A., sec. 642, 52 Stat. 900.

Appendix

Opinion of United States Court of Appeals, Second Circuit

Before CLARK, HINCKS and HARLAN, Circuit Judges.

HARLAN, Circuit Judge.

These appeals are another chapter in a protracted series of litigations growing out of proceedings for the reorganization of Central States Electric Corporation, a Virginia corporation, which were initiated by the filing of a petition under Chapter X of the Bankruptcy Act, 11 U.S.C. § 501 et seq., 11 U.S.C.A. § 501 et seq., in the United States District Court for the Eastern District of Virginia on February 23, 1942, and approved by that Court on February 27, 1942.

Pursuant to an order of the Virginia Reorganization Court, on July 5, 1945 Carl J. Austrian and Robert G. Butcher, as Trustees of Central States, filed an action in the Southern District of New York, where Central States was doing business, against its officers, directors and principal stockholder charging them with various derelictions in their handling of Central States' affairs. A lengthy trial before Judge Weinfeld resulted in a dismissal of the action against the defendants who are parties to the present appeals, viz., Fogarty, Freeman, Johnson, McCornack, Eccles, Baker and Jonas (deceased and now represented by his Executor Pasternak), and also against the other defendants, not parties to these appeals, except Harrison Williams and Louis E. Kilmarx as to whom a judgment in excess of $14,000,000 was entered. See Austrian v. Williams, D.C.S.D.N.Y.1952, 103 F.Supp. 64. The District Court reserved jurisdiction to deal, among

other things, with "costs, expenses and allowances." On appeal by Williams to this Court, the judgment was reversed (Clark, C. J., dissenting) on the ground that the action was barred under both the 6 and 10-year New York statutes of limitation, N.Y.Civil Practice Act § 48, subd. 3, and § 53. See Austrian v. Williams, 2 Cir., 198 F.2d 697, certiorari denied 1952, 344 U.S. 909, 73 S.Ct. 328, 97 L.Ed. 701.

Following the successful result of the Trustees' action as to them, the seven defendants who are parties to these appeals brought on applications before Judge Weinfeld for allowances of expenses and attorneys' fees in that action. Except as to Jonas, all of these applications were made pursuant to Article 6A, §§ 63-68, of the General Corporation Law of New York, McKinney's Consol.Laws. c. 23, which provides that directors, officers or employees of corporations who have successfully defended their official conduct in an action brought by or on behalf of their corporation may recover from the corporation their reasonable expenses and attorneys' fees incurred in such action. Jonas, who was never a director, officer or employee of Central States, addressed his application to the general equity powers of the District Court.

Upon these applications, Judge Weinfeld made allowances in various amounts, aggregating some $45,000, and his action has resulted in the following appeals: (1) the Trustees appeal from the District Court's order and judgment of October 17, 1953 granting the allowances, contending that the Court was without power to make any of them; (2) Jonas (Pasternak) appeals from so much of the order and judgment of October 17, 1953 as limits his allowance to $3,500; and (3) Fogarty and

Freeman appeal from the District Court's order of December 10, 1953 vacating a separate judgment, dated November 4, 1953, covering the allowances in their favor. The Securities and Exchange Commission has appeared as *amicus curiae* and has furnished us with a helpful brief.

We come first to the appeal of the Trustees so far as it relates to the allowances made under Article 6A of the New York General Corporation Law. The District Court held that application of the New York Statute followed from the decision of this Court in Austrian v. Williams, 2 Cir., 198 F.2d 697, certiorari denied 1952, 344 U.S. 909, 73 S.Ct. 328, 97 L.Ed. 701, holding the action herein barred by the New York Statute of Limitations. The District Court further held that it, rather than the Virginia Reorganization Court, was the proper forum for the determination of these claims to reimbursement, but stated in its opinion that the order would not direct enforcement of the allowances as that was a matter for the Reorganization Court. Austrian v. Williams, D.C.S.D.N.Y., 120 F. Supp. 900, decision of Judge Weinfeld, August 21, 1953.

The District Court evidently read our decision on the limitations question as extending the doctrine of such cases as Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, which require the application of State "substantive" law by Federal courts in diversity cases, to cases where although, as here, jurisdiction depends on a Federal ground independent of diversity [see Williams v. Austrian, 1947, 331 U.S. 642, 67 S.Ct. 1443, 91 L.Ed. 1718] the cause of action involved seeks enforcement of a State-created right.

This is a mistaken view of our decision. We held the New York Statute applicable in its full sweep in accordance with New York's decisional rules because of the provisions of Section 11, sub. e, of the Bankruptcy Act, 11 U.S.C. § 29(e), 11 U.S.C.A. § 29, sub. e, making State statutes of limitation applicable to suits instituted by a receiver or bankruptcy trustee where no Federal period of limitation existed. The New York Statute, rather than the Virginia Statute of Limitations, was held to apply since even if the causes of action sued upon were to be regarded as stemming from the law of Virginia (where Central States was incorporated), nonetheless under the conflicts of law rule the governing statute of limitations is that of the forum.

In this instance, we have no provision of the Bankruptcy Act which directs the application of any state laws providing for the recovery of expenses by defendants who have successfully defended actions brought against them. The question of whether there are other reasons why Article 6A should be applied therefore must turn on considerations which were not reached by this Court in its decision as to the statute of limitations. However, we think that we need not and should not decide this question since we are of the opinion that in no event did the District Court have jurisdiction to consider or make any of the allowances. This was a function belonging exclusively to the Virginia Reorganization Court.

The administration of the estate of a bankrupt or debtor belongs exclusively to that Court which has acquired jurisdiction over its affairs. While the Plan of Reorganization of Central States is not before us, it appears that

it has been finally approved and consummated *except* for the winding up of the action against the Central States directors which, together with other contingent assets of the Debtor, was retained in the hands of the Trustees. Funds were also reserved in the hands of the Trustees to provide for "allowances and expenses * * * in retaining and enforcing the contingent assets of the Estate, and in distributing the proceeds thereof." See Austrian v. Williams, D.C.S.D.N.Y., 120 F.Supp. 900, decision of Judge Weinfeld, August 21, 1953; Central States Electric Corp. v. Austrian, 4 Cir., 1950, 183 F.2d 879, 882, certiorari denied 1951, 340 U.S. 917, 71 S.Ct. 350, 95 L.Ed. 662; Chase v. Austrian, 4 Cir., 189 F.2d 555, certiorari denied 1951, 341 U.S. 952, 71 S.Ct. 1021, 95 L.Ed. 1374. The determination of these claims of the successful defendant-directors for reimbursement of their expenses in that action—constituting as they did claims against the assets of the Debtor remaining in the hands of the Virginia Reorganization Court—lay, we think, within the exclusive jurisdiction of the Reorganization Court. Brown v. Gerdes, 1944, 321 U.S. 178, 64 S.Ct. 487, 88 L.Ed. 659.

In the Brown case the attorneys for the Trustees of a Chapter X Debtor brought a proceeding in the New York courts under § 475 of the New York Judiciary Law, McKinney's Consol.Laws, c. 30, to establish a lien for their fees in a number of actions in the New York courts instituted under the authority of the Reorganization Court, in which they had represented the Debtor, and later the Trustees, until their services had been terminated by the Trustees before final judgment in any of the actions had been entered. The Supreme Court, confirming a decision of the New York Court of Appeals, In re Brown, 290 N.Y.

468, 49 N.E. 2d 718, held that the New York courts had no jurisdiction to determine the attorneys' fees, because Chapter X of the Bankruptcy Act had committed that function exclusively to the Reorganization Court.

We do not think that the force of that case is lessened here by reason of the fact that Brown was concerned with the compensation of the attorneys for the estate, whereas in the present case the allowances related to expenses and attorneys' fees of former directors of the Debtor. These allowances were nonetheless payable out of the Debtor's estate, and Chapter X "contains detailed machinery governing all claims for allowances from the estate." Brown v. Gerdes, supra, 321 U.S. at page 182, 64 S.Ct. at page 489. Indeed, so paramount is a reorganization court's jurisdiction over allowances which may affect the administration of the estate that the Supreme Court has held that such jurisdiction extends to allowances for services performed by attorneys for a stockholders' committee in a reorganization proceeding, even though not payable out of the estate. Leiman v. Guttman, 1949, 336 U.S. 1, 69 S.Ct. 371, 93 L.Ed. 453.

Nor is the impact of the Brown and Leiman cases affected by the fact that the claims of the defendant-directors were grounded on the State statute. Even if it be assumed that the doctrine of Cohen v. Beneficial Industrial Loan Corp., supra, should be extended to carry into this action the right of reimbursement given by Article 6A, we find nothing in that case which would divest the Reorganization Court of jurisdiction to pass upon these claims. At most, Cohen would reach only the "substantive" aspects of Article 6A, that is the right of the successful defendant-directors to reimbursement, and not its

"procedural" aspects—that is, the manner or forum in which such right is to be enforced.

A different conclusion as to *jurisdiction* might possibly be reached if the Trustees' cause of action under New York law had been conditioned upon the rights of reimbursement from the corporation (now the Debtor) which the successful defendant-directors sought to enforce in this action. Perhaps then it could have been argued that the submission of the main controversy to the Federal Court in New York carried with it also the submission of the controversy as to the rights of reimbursement. But since under the New York statute (unlike the New Jersey statute involved in the Cohen case) the plaintiffs' rights stood quite apart from the defendants' rights to reimbursement, we think that such an argument is not available here. Perhaps we should say that we intend no intimation of our views as to the applicability or non-applicability of Article 6A in this case, for we consider this a question for the Reorganization Court in the event that the applications for reimbursement are renewed there.

For the same reasons, we do not reach the propriety of the allowance made to Jonas (Pasternak) which the District Court thought justified under its general equity power, as exemplified in such cases as Sprague v. Ticonic Nat. Bank, 1939, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; Rolax v. Atlantic Coast Line R. Co., 4 Cir., 1951, 186 F.2d 473, and Cleveland v. Second Nat. Bank & Trust Co., 6 Cir., 1945, 149 F.2d 466. Here again we think that exclusive jurisdiction to entertain and dispose of the Jonas (Pasternak) application is in the Virginia Reorganization Court.

The District Court concluded: "The present disposition [the making of the allowances] will in nowise conflict with the administration in the Bankruptcy Court. The order to be entered herein will determine the liability of the corporation [the Debtor] but will not direct its enforcement. That is a matter for the Bankruptcy Court." But we think that this overlooks the fact that the Bankruptcy Court's jurisdiction was not limited to mere enforcement—it also had the sole power to determine and measure the rights of the defendants to reimbursement.

Because of the conclusion we have reached on the main appeal of the Trustees, it becomes unnecessary for us to discuss separately the cross appeal of Jonas (Pasternak) from the order and judgment of October 17, 1953, or the appeals of Fogarty and Freeman from the order of December 10, 1953.

On appeal of plaintiffs-appellants, and on cross appeal of defendant-appellant Pasternak, order and judgment reversed and proceedings in the District Court dismissed for lack of jurisdiction, without prejudice to renewal of the applications for allowances in the United States District Court for the Eastern District of Virginia; on appeal of defendants-appellants Freeman and Fogarty, order affirmed and proceedings in the District Court for separate judgment dismissed for lack of jurisdiction.

ON REARGUMENT.

In our original opinion disposing of these appeals we held that the District Court for the Southern District of New York was without jurisdiction to pass upon these applications for allowances, such jurisdiction resting entirely with the Virginia Reorganization Court. The further

contentions, on reargument, of the unsuccessful parties have failed to convince us to the contrary. Certain of their arguments, however, warrant some elaboration of what was said in our original opinion.

The principal contention is that Southern District jurisdiction to deal with the allowances involved results from the earlier decisions of this Court and the Supreme Court in Austrian v. Williams, 2 Cir., 1946, 159 F.2d 67, and Williams v. Austrian, 1947, 331 U.S. 642, 67 S.Ct. 1443, 91 L.Ed. 1718, in which it was held that under Section 2, sub. a(7) of the Bankruptcy Act, 11 U.S.C.A. § 11 sub. a (7), the Southern District Court had jurisdiction to entertain the plenary action out of which the present applications for allowances arose. It is said that these applications being merely an incident of such a plenary action under Art. 6-A of the New York Corporation Law, McKinney's General Corporation Law, § 63 et seq., it follows that the Southern District Court also had jurisdiction to deal with them, especially since subdivision a(2) and (18) of the same section of the Bankruptcy Act give courts of bankruptcy power to allow claims and to tax costs against bankrupt estates in proceedings brought under the bankruptcy laws. We cannot agree.

All that these earlier cases decided was that since the limitations of § 23 of the Bankruptcy Act, 11 U.S.C.A. § 46, do not apply in a Chapter X, 11 U.S.C.A. § 501 et seq., proceeding, a Chapter X trustee may under § 2, sub. a(7) sue in any federal court having personal jurisdiction of the defendants upon any cause of action belonging to the estate, even though no independent ground of federal jurisdiction exists. These cases did not decide that the reorganization court and all other federal courts have

concurrent jurisdiction to exercise *every* bankruptcy power applicable to a Chapter X proceeding. Indeed, in Williams v. Austrian the Supreme Court, 331 U.S. at page 647, 67 S.Ct. at page 1445, noted that "certain aspects of a bankruptcy proceeding could be handled only by the court in which the [bankruptcy] adjudication was had * * *.". Nor did these cases reach the question as to whether the powers contained in section 2, subdivision a(2) and (18) might also be exercised by the Southern District Court.

We think that jurisdiction to make the ultimate disposition of these applications—whether based on Art. 6-A or upon the general equity powers of the court—was exclusively reserved to the Virginia Reorganization Court under § 221(4) of the Bankruptcy Act, 11 U.S.C.A. § 621(4), as the Securities and Exchange Commission has persuasively argued. That section provides that the reorganization judge shall confirm a plan "if satisfied that—* * * (4) all payments made or promised by the debtor * * * for services and for costs and expenses * * * in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge". These allowances were payable "by the debtor". Arising out of a lawsuit which was a potential asset of the estate and involved in the plan, they were "in connection with the plan and incident to the reorganization". And being fixable after confirmation of the plan, they were "subject to the approval of the [reorganization] judge".

We find nothing in § 221(4) which limits its application to expenses incurred or services performed by parties to the reorganization or their attorneys. On the contrary,

Leiman v. Guttman, 1949, 336 U.S. 1, 8, 69 S.Ct. 371, 93 L.Ed. 453, characterized the terms of this section as "pervasive," and it would be quite inconsistent with the rationale of Leiman and Brown v. Gerdes, 1944, 321 U.S. 178, 64 S.Ct. 487, 88 L.Ed. 659, to interpret the language of § 221(4) short of its full scope. Indeed, the situation here, where these allowances were payable out of the estate, is *a fortiori* to that in Leiman, where the payments involved did not go against the estate.

Since § 221(4) vests the ultimate disposition of these applications in the Virginia Reorganization Court, it was error for the New York Court to grant any judgment with respect to them. We do not think that such error is obviated by the fact that the Court below left the "enforcement" of its judgment to the Virginia Court. If, as counsel for some of the defendants suggested on oral argument, this means that the Virginia Court's function would be limited to the mere adjustment of the burden of the allowances as between the security holders of the debtor such a limitation would surely run afoul of § 221(4). On the other hand, were we to interpret the judgment below as permitting the Virginia Court to reduce the allowances or to set them aside entirely, we think this would nonetheless impinge upon that Court's exclusive control over the administration of the debtor's estate and the plan. See Section 111 of Chapter X, 11 U.S.C.A. § 511. For example, the Virginia Court would be faced with providing for the expense of resisting these claims in two courts, since the Trustees could scarcely be taken to have defended against the claims in the Southern District at the peril of not being compensated. Moreover, if notwithstanding the Southern District judgment the Virginia Court would still

be free to deal with these applications *de novo,* it is hard to see what useful purpose the Southern District proceedings would have served. The consideration that the Southern District, rather than the Virginia, Court was in the better position to appraise what was done in defending the litigation is one which was equally present in Brown v. Gerdes.

It is also said that the mere bringing of this suit in the Southern District Court operated to confer jurisdiction over these allowances, since liability for the expenses of the successful defendant-directors was, under Art. 6-A, a condition attaching to the Trustees' cause of action. But as stated in our original opinion, which we consider unnecessary to elaborate in this respect, we do not think such liability can properly be regarded as conditioning the cause of action itself, either under the terms of Art. 6-A or under the rationale of Cohen v. Beneficial Indus. Loan Corp., 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528. Moreover, even were this possible liability considered as a condition, imposed by the New York legislature, upon the right to sue, whatever efficacy such a condition might have would be limited to suits in the New York State Courts. It would not have the effect of conditioning the Trustees' right to invoke Southern District jurisdiction over this plenary action, which is a jurisdiction conferred by the Bankruptcy Act. It may be that a liability for costs is generally a condition to suit. But the scope of costs in federal courts is determined only by federal law which does not classify the allowances and expenses here involved (including that to Jonas under the general equity powers of the court[1]) as ordinary allowable costs. Such

1. See People of Sioux County, Neb. v. National Surety Co., 1928, 276 U.S. 238, 241-44, 48 S.Ct. 239, 72 L.Ed. 547.

allowances and expenses may have an impact upon the administration of an estate or a plan of reorganization which ordinary costs do not have because of their comparatively nominal amount. Consequently, from the fact that the Trustees by suing in the federal court subject the estate to the costs taxable in a federal court, it would not follow that the federal court in which this suit was brought would have jurisdiction to determine a liability arising as a condition to suit in a court of the State. By this we do not mean to express any view as to the validity of a defendant's state-created right to reimbursement or the enforceability of that right in a federal court of competent jurisdiction. We simply hold that when, as here, it arises out of an action brought by a trustee of a debtor in reorganization under Chapter X of the Bankruptcy Act, only the Reorganization Court has jurisdiction to determine and enforce the right to reimbursement.

This conclusion is, we think, quite in harmony with the scheme of things of Art. 6-A, under which in State actions applications for reimbursement may be made either in the trial Court or, for "reasonable cause," in the New York Supreme Court. For it would seem that when such an action is tried in a federal court other than the reorganization court there are ample reasons why such applications should be made in the reorganization instead of the trial court, and that such procedure is the substantial equivalent of an application in a State litigation which is made in the Supreme Court for "reasonable cause," rather than in the court where the action was tried. But if what we have held nonetheless be considered to offend against Art. 6-A, it need only be said that the State statute must yield to the supremacy of the bankruptcy laws.

Finally, we do not think that in bringing a plenary suit against former officers of the debtor, the Trustees were "carrying on business" of the debtor, so that under 28 U.S.C.A. § 959 they might have forfeited their immunity from suit, and become exposed to liability in any court, state or federal, where the controversy might be heard if the Trustees were ordinary businessmen. Merely to attempt to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term. See Vass v. Conron Bros., 2 Cir., 1932, 59 F.2d 969. We consequently are not required to reach the question, subject to some dispute, of the exact effect of 28 U.S.C.A. § 959 on Chapter X proceedings, as distinguished from ordinary bankruptcy proceedings. See 6 Collier on Bankruptcy 744-48.

For these reasons we adhere to our original decision on these appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 538

WILLIAM CALVARESI AND JERRY BENALLO, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 548

EUGENE SMALDONE AND CLYDE SMALDONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (J. A. 1-26)[1] is reported at 216 F. 2d 891.

[1] The symbol "J. A." refers to the Joint Appendix accompanying the petitions for writs of certiorari. The symbol "Pet. I" refers to the petition for writ of certiorari filed by Calvaresi and Benallo, and the symbol "Pet. II" refers to the petition filed by Eugene and Clyde Smaldone.

JURISDICTION

The judgments of the Court of Appeals were entered on November 2, 1954 (J. A. 27–31, 2), and the petitions for rehearing were denied on November 16, 1954 (J. A. 31). On December 10, 1954, the time for filing a petition for a writ of certiorari by Eugene and Clyde Smaldone was extended by order of Mr. Justice Clark to January 15, 1955 (J. A. 32), on which date their petition was filed. On December 13, 1954, the time for filing a petition for a writ of certiorari by Calvaresi and Benallo was extended by order of Mr. Justice Clark to January 15, 1955 (*ibid.*). They filed their petition on January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).[2]

QUESTIONS PRESENTED

1. Whether the indictments, which charged petitioners with the substantive offenses of obstructing justice by tampering with jurors and with the bribing of jurors, were legally insufficient because the jurors involved were not named.

2. Whether 18 U. S. C. 206, making it an offense to bribe a juror, covers bribery of a juror who has been summoned on a panel but has not been selected and sworn to sit in a particular case at the time the bribe is extended.

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[2] Petitioners were tried together in the District Court and both petitions can be conveniently answered in one brief in opposition.

3. Whether the trial court was biased and prejudiced against petitioners.

4. Whether petitioners were denied a fair trial as a result of unfavorable press, radio, and television publicity given their case during the period that preliminary proceedings were held.

5. Whether petitioners were prejudiced by being tried jointly.

6. Whether a single agreement envisaging violation of two statutes constitutes two separate offenses of conspiracy for which separate sentences may be imposed. (The Government concedes that the answer is "no," but, as indicated *infra,* believes that the question, as to two petitioners, is academic, and, as to the remaining two, that it is prematurely raised.)

STATUTES INVOLVED

18 U. S. C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or hav-

ing attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 206 provides:

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe, to any judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote, opinion, or decision thereon, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be dis-

qualified from holding any office of honor, trust, or profit under the United States.

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

The Indictments and Sentences.—During September and October 1953, a series of conspiracy and substantive indictments, involving alleged acts of jury tamperings, were filed against petitioners and others in the United States District Court for the District of Colorado (R. 10–12, 75–76, 85–91, 102–104, 112–121, 148–158).

There were two conspiracy indictments (R. 112–121, 148–158). One of these, No. 13800, charged, in two counts, that, commencing about June 1, 1953, and continuing to the date of the indictment, petitioners, together with one Michael Benallo and others, had conspired to violate 18 U. S. C. 1503, by obstructing the due administration

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of justice, and that, during the same period, they had conspired to violate 18 U. S. C. 206, by offering a bribe to jurors, all in violation of 18 U. S. C. 371 (R. 112–121). The two counts of the second conspiracy indictment (No. 13833), except for the fact that each named an additional defendant and each alleged two additional overt acts relating to such defendant, were substantially the same as the corresponding counts in No. 13800 (R. 148–158).

Each of four substantive indictments named one of the four petitioners, individually, and charged him (in two or more counts) with substantive offenses based upon the pertinent overt acts alleged in the conspiracy indictments (R. 10–12, 75–76, 85–91, 102–104). In each of these substantive indictments, one-half of the counts charged obstruction of justice; the remaining half, bribery of a juror or jurors.

Before trial, petitioners Eugene and Clyde Smaldone pleaded guilty to both counts of conspiracy indictment No. 13833 (R. 158–159, 162–164) and not guilty to the charges of the other indictments. Their co-defendants pleaded not guilty to all charges (R. 91, 105, 122. 13, 76–77, 162–163).

All of the indictments, except the second conspiracy indictment (No. 13833), were consolidated for trial (R. 70, 82, 96, 107, 135, 229–230, 238). After a severance of some of their co-defendants in conspiracy indictment No. 13800,

petitioners were tried together by a jury and found guilty on all charges on October 29, 1953 (R. 135, 230, 71, 82, 97, 107, 136).[3]

The sentences which remain in the case after decision of the Court of Appeals are as follows:

Eugene Smaldone, on eight substantive counts, a total of twenty-five years' imprisonment and $11,000 fine (R. 98–99; J. A. 26, 28); on conspiracy indictment No. 13833, to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the sentences on the substantive counts (R. 165–166).[4]

Clyde Smaldone, on six substantive counts, a total of fifty years' imprisonment and a $24,000 fine (R. 107–108). On the conspiracy indictment to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the judgment on the substantive counts (R. 166–167).

William Calvaresi and Jerry Benallo, on four and two substantive counts, respectively, fifteen years' imprisonment and $5,000 fine as to each petitioner (R. 72–73, 82–83); on conspiracy indictment No. 13800, as to each petitioner sus-

[3] Michael Benallo was also tried and convicted with petitioners on conspiracy indictment No. 13800, but his conviction was reversed on appeal (J. A. 25).

[4] A suspended sentence on the conspiracy charge which was tried was reversed on the ground that trial thereunder was double jeopardy in view of the plea of guilty (J. A. 25). Eight of sixteen substantive counts were reversed (J. A. 26, 28).

pended terms of five years' imprisonment (R. 138–140).[5]

Government's Evidence.—The pertinent evidence adduced by the Government may be summarized as follows:

On June 2, 1953, petitioner Eugene Smaldone was a defendant on trial in a criminal tax case in the United States District Court for the District of Colorado. On June 3, 1953, his trial was continued until June 10, 1953, because of his illness. After a resumption of the trial, a mistrial was declared on June 12, 1953, and the case was set down for September 21, 1953, for a retrial. (R. 443, 438, 439, 440.)

A few days following the continuance of the trial, Fiore Smaldone, a first cousin of Eugene and Clyde Smaldone, visited one Mrs. Baer, an acquaintance whom he had not seen for about thirty years (R. 374–375, 378, 381, 382–383, 385, 391). He asked her to "hang the jury" in the Smaldone case (R. 381, 384) and expressed surprise when Mrs. Baer informed him that she had been discharged from the jury panel (R. 381).

On or about June 19, 1953, Fiore Smaldone and petitioner Clyde Smaldone visited one Lawson, with whom they had previously done business, at his automobile agency in Longmont, Colorado (R. 410, 411, 412, 414, 409). They discussed with him

[5] The trial court had also found petitioners guilty of contempt of court on the basis of the evidence adduced at the trial (R. 172–174, 175, 479–480), but the Court of Appeals reversed these convictions (J. A. 26).

Eugene Smaldone's tax case and inquired about Lawson's business acquaintance, Owen Spencer, who was on the federal jury panel (R. 411, 403). They told Lawson that Spencer was on the jury panel and asked whether he "would talk to him [Spencer] if he got on the jury" (R. 411, 404–405). On June 23, 1953, Lawson, while negotiating to sell Spencer a new car, engaged him in a discussion of the Eugene Smaldone tax case, telling him that Smaldone was not guilty and that "he thought he was being framed" (R. 403, 404, 405, 412). Lawson, while discussing Spencer's prospective jury service, offered to make him "a good car deal" (R. 405).

During August, 1953, Fiore Smaldone and petitioner Clyde Smaldone again visited Lawson (R. 412–413). They showed him what they described as a prospective jury list and asked him about three names appearing thereon (R. 413, 417). When he stated that he knew one of the three, they asked him to try to "influence" that individual to "hang the jury" in the tax case (R. 413, 415).

About the beginning of September, 1953, Eugene Smaldone, accompanied by Clyde Smaldone, asked one SaBell to convey his offer of "three-fifty" to Frank Rossi to "sit on the jury in the Eugene Smaldone tax trial" (R. 364, 365–367, 368, 369, 360). SaBell conveyed the offer to Rossi. Rossi, at that time, had not received a jury summons. Subsequently, however, he was

called to the panel. (R. 367–368, 360, 361.) SaBell then reported to Eugene Smaldone that "everything was all right" (R. 368).

In September, 1953, Clyde Smaldone spoke to one Roland, who had obtained some insurance for the Smaldones (R. 370–371). He told Roland that there were "several insurance men on the present jury panel," and, showing him a list of names, asked whether he could identify some of them (R. 372). After Roland identified one name, Clyde Smaldone asked whether the man could be influenced (R. 372–373).

During the early part of September, 1953, Eugene and Clyde Smaldone visited one Walton, their insurance broker (R. 356–357). They asked him whether he knew a certain insurance man. Walton was uncertain. Subsequently, Eugene Smaldone repeated the visit, seeking the same information. (R. 357–358.)

On September 7, 1953, petitioner Calvaresi visited his neighbor, one Mrs. Alsup, who had been summoned for federal jury duty during the September term (R. 323, 326, 332). He told her that Eugene Smaldone had asked him to offer her $250 if she "would sit on the jury" in his case (R. 324, 326, 327, 328, 342–343). On September 9, Calvaresi again visited Mrs. Alsup and repeated the offer (R. 324).[6] He also told

[6] An F. B. I. agent testified that Calvaresi had given him an oral statement admitting that he importuned Mrs. Alsup at the behest of Eugene and Clyde Smaldone (R. 346, 349–352).

her that "somebody was going to get the money" and that it might as well be she (R. 326).

A week later, petitioner Jerry Benallo, an acquaintance of Mrs. Alsup, also visited her (R. 325, 329, 330, 335, 336). He told her that if she "would string along" with the Smaldones, "they would have a nice little gift" for her (R. 325, 330, 337, 339).

About mid-September, Eugene Smaldone called one McCusker to a tavern, where he showed him a list of names. McCusker identified the name of Miss Buschbach, whose father he knew. (R. 430, 432, 425.) Smaldone then asked McCusker to see Buschbach and to inquire concerning the daughter's sentiments about the tax case (*ibid.*). He also told McCusker that he might offer Buschbach $500 (R. 432, 435). McCusker then visited Buschbach and discussed with him the daughter's attitude toward the tax case (R. 433, 436–437).

None of the petitioners testified or offered any evidence in his own behalf, except that petitioners Calvaresi and Benallo offered evidence of good reputation (R. 447–454).

ARGUMENT

1. The substantive indictments on obstruction of justice charged that on a specified date, the respective petitioner

> did corruptly and by threats and force and by threatening communication endeavor to influence, intimidate and impede a petit

> juror of the United States District Court, sitting in and for the District of Colorado, and corruptly and by threats and force and by threatening communication influenced, obstructed, impeded and endeavored to influence, obstruct and impede the due administration of justice in the trial scheduled for the 21st day of September, 1953, The United States of America versus Eugene Smaldone, also known as Checkers Smaldone, in violation of Title 18 USC, Section 1503 [*e. g.* R. 10–11].

The bribery counts charged that, on the same occasions, the respective petitioner

> did directly and indirectly give and offer to give money and a thing of value and a promise and agreement therefor and a bribe to a juror summoned to the panel in the cause of the United States versus Eugene Smaldone, also known as Checkers Smaldone, because of and with intent to influence said juror's action, vote, opinion, and decision thereon, contrary to and in violation of Title 18 USC, Section 206 [*e. g.* R. 11].

Petitioners' contention (Pet. I, 23–25; Pet. II, 13–17), that the substantive indictments are void because they do not identify the jurors to whom they refer, is without merit.[7] An indictment is void for insufficiency where it fails to charge the

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[7] Petitioners do not challenge here the sufficiency of the conspiracy indictments upon which their convictions were affirmed (Pet. I, 24–25; Pet. II, 2, 16).

essential elements of an offense, or where the defect goes to jurisdiction. See Rule 12 (b) (2), F. R. Crim. P. The identity of the jurors, although, as the court below noted (J. A. 9), material in the proof of the offenses charged in the substantive indictments, was not an essential element of the offenses. The assertion (Pet. I, 23–25; Pet. II, 13–17) that the failure of the court below to dismiss the substantive indictments for insufficiency was inconsistent with its statement that the identity of jurors was material to the proof under such indictments completely overlooks the basic distinction between essential matters of pleading and material elements of proof. Without identifying the jurors, the substantive indictments concretely charged two types of offenses: that petitioners, on specified dates, corruptly endeavored to influence petit jurors sitting in the United States District Court for the District of Colorado and thereby impede the due administration of justice in the trial of *United States* v. *Eugene Smaldone,* scheduled for a certain date; and that, on the same dates, petitioners offered bribes to jurors summoned to the panel in the case of *United States* v. *Eugene Smaldone.* Thus, the indictments were sufficient to apprise petitioners of the nature of charges they had to meet and to enable them to plead former jeopardy in the future. See *United States* v. *Josephson,* 165 F. 2d 82, 85 (C. A. 2), certiorari denied, 333 U. S. 838; *Carter* v. *United States,*

173 F. 2d 684, 685 (C. A. 10), certiorari denied, 337 U. S. 946; *Robertson* v. *United States,* 168 F. 2d 294 (C. A. 5).[8]

There is no occasion to consider whether the failure to name the jurors constituted a non-jurisdictional defect. Under Rule 12 (b) (2), F. R. Crim. P., a defect of that character is waived unless raised by motion before trial. See *United States* v. *Williams,* 203 F. 2d 572, 573 (C. A. 5); *Michener* v. *United States,* 170 F. 2d 973, 975 (C. A. 8); *Weatherby* v. *United States,* 150 F. 2d 465, 466 (C. A. 10). No such motion was made.[9]

[8] The claim of petitioners Calvaresi and Benallo (Pet. I, 24), that the substantive indictments were void for failure to charge that petitioners knew that the persons they approached were jurors, is without substance. The allegations that they tried to influence the action of jurors in a named case necessarily alleges that they knew the persons were jurors. See *Parsons* v. *United States,* 189 F. 2d 252 (C. A. 5).

[9] Motions for bills of particulars, seeking, *inter alia,* the names of the jurors (R. 66–69, 80–82, 92, 106, 122–125, 130–131) were denied before trial (R. 70, 82, 96, 107, 135). This was apparently an attempt to find out what witnesses the government intended to use. The names on the panel which was to try Smaldone were available to petitioners and the dates of the attempts to approach the jurors were specifically given in the indictment. Petitioners do not show that the denial prejudiced them in meeting the charges of the indictment. Under the circumstances, the denial of the motions was not an abuse of discretion. *Gates* v. *United States,* 122 F. 2d 571 (C. A. 10), certiorari denied, 314 U. S. 698; *Truck Drivers' Local No. 421, etc.* v. *United States,* 128 F. 2d 227 (C. A. 8); *Chadwick* v. *United States,* 117 F. 2d 902 (C. A. 5), certiorari denied, 313 U. S. 585; *Landay* v. *United States,* 108 F. 2d 698 (C. A. 6), certiorari denied, 309 U. S. 681; see also *United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari

2. Petitioners urge (Pet. I, 25–28; Pet. II, 32–35) that the provisions of 18 U. S. C. 206, making it an offense to bribe a juror, should not be deemed to cover bribery of a person who has been summoned on a panel but has not been selected and sworn to sit in a particular case. But the statutory language is plainly broad enough to cover veniremen. It provides that it shall be an offense to bribe *"any * * * juror * * ** authorized by any law of the United States to hear or determine *any question, matter, cause, proceeding, or controversy,* because of or with intent to influence his action, vote, opinion, or decision thereon" (emphasis added). Thus, it necessarily covers a juror summoned on a panel, because as soon as one is so summoned, and until finally discharged, he is a person authorized by law to hear any cause which may be presented in the court, and his actual selection for service on a particular jury merely furnishes him the proper occasion for the exercise of that authority.

The word "juror", itself, has been used almost universally to denote "any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled or not." *United States* v. *Marsh,* 106 Fed. 474, 481 (C. A. 5); see *United States* v.

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denied, 323 U. S. 799. Moreover, the motions by Calvaresi and Benallo with respect to the substantive indictments, filed more than ten days after arraignment (R. 13, 69, 76, 80), were not timely under Rule 7 (f), F. R. Crim. P.

Russell, 255 U. S. 138; *People* v. *Newmark*, 312 Ill. 625, 144 N. E. 338; *State* v. *Maddox*, 80 S. C. 452, 61 S. E. 964; *Marvin* v. *District Court*, 126 Iowa 355, 102 N. W. 119; *State* v. *McCrystol* (La.), 9 S. 922; *Baumgartner* v. *Joughin*, 105 Fla. 335, 141 So. 185. Indeed, in *United States* v. *Russell*, 255 U. S. 138, this Court construed the predecessor of 18 U. S. C. 1503, which punishes, *inter alia*, the intimidation of jurors, to include veniremen. Certainly, there is no reason to suppose that Congress intended to deal more narrowly with corruption of jurors than with intimidation of jurors. It is equally difficult, as the court below stated (J. A. 9), to believe that Congress "intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case."[10]

3. Petitioners claim (Pet. I, 28–31; Pet. II, 27–29) that the trial judge's actions and comments before and during trial evidenced such bias against petitioners as to deny them a fair trial.

[10] There is no basis to the suggestion of petitioners' Calvaresi and Benallo (Pet. I, 25, 28) that the instant decision is in conflict with *United States* v. *Sager*, 49 F. 2d 724 (C. A. 2), which held that the terminology of the predecessor of section 206 did not cover a juror at all. The section was amended for the specific purpose of closing the gap revealed by the *Sager* decision. See 18 U. S. C. 206, Reviser's Note.

In the court below, petitioners argued that the trial judge erred in refusing to grant their motions for his disqualification, and that his various rulings during the trial (such as denying without a hearing their motions for acquittal, invoking the contempt power against them, and imposing severe sentences without inquiring whether they desired to make any statements in their own behalf [11]) confirmed their claims of personal bias and prejudice (R. 1–7; J. A. 38–46). The Court of Appeals, after holding that petitioners' affidavits in support of their motions for the trial

[11] Petitioners' claim (Pet. II, 37–39; Pet. I, 33–34) that the trial court committed reversible error in failing to inquire, prior to imposition of sentence, whether petitioners desired to make statements in their behalf, is without merit. Under the circumstances, the error, if any, was harmless. *Shockley* v. *United States*, 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C. A. 2). The court below (J. A. 14), although recognizing that in accordance with "the spirit" of Rule 32 (a), F. R. Crim. P., a trial court should ask if a defendant wishes to make a statement in his behalf, noted that petitioners had not "asked or indicated that they desired to make a statement either in person or through competent attorneys representing them, who were then present in court." It then held that, "In the absence of such a request by competent counsel representing them at the time, we cannot say that they were not afforded an opportunity to be heard before sentence was imposed, had they desired such a hearing" (J. A. 14). The pertinent provision of Rule 32 (a) was intended primarily to prohibit the judge from denying defendants the right to make a statement rather than to impose upon him a mandatory duty to inquire whether a defendant desired to make a statement. Cf. *Federal Rules of Criminal Procedure*, New York University School of Law Institute Proceedings (1946), p. 205.

judge's disqualification before trial were, as petitioners now appear to concede (Pet. I, 29; Pet. II, 27), legally insufficient, held further that the matters concerning which petitioners complained related "largely to the exercise of discretion by the court and in themselves alone are not sufficient to show bias and prejudice" (J. A. 12, 13). And it concluded, from a very careful examination of the record (see J. A. 12), that there was no basis for holding "that the trial court's exercise of discretion was arbitrary" (*ibid.*).

It is significant that the petitioners do not point to anything which happened at the trial itself to support their conclusion that they were denied a fair trial. The record shows that, although petitioners made few objections to the evidence during the trial, the court sustained most of their objections and was careful to prevent the reception of improper evidence (R. 324–325, 338–339, 343, 344, 346–347, 348, 354, 358, 361, 362–364, 365, 373, 375–377, 378–381, 382, 383, 385–387, 388, 393–394, 401–402, 404, 408–409, 410, 417, 421–422, 424, 425–430, 436, 438–444). To say that the trial judge erred in some of his rulings, *e. g.*, finding petitioners in contempt of court on the basis of the offenses proved against them at the trial, does not establish bias or prejudice. See *Berger* v. *United States*, 255 U. S. 22, 31. As the Court of Appeals concluded, after its study of the record, the trial was fairly conducted, and the actions of the judge which formed the pri-

mary basis of complaint did not show any "aggressive antipathy" or such "a bent of mind" as to "prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U. S. 22, 33; *Eisler* v. *United States*, 170 F. 2d 273 (C. A. D. C.); see also *Connelly* v. *United States District Court*, 191 F. 2d 692 (C. A. 9).

4. Petitioners contend (Pet. I, 31–33; Pet. II, 21–27) that unfavorable press, radio and television publicity given their case at the time of their arrest and during the various stages of preliminary proceedings so inflamed public opinion against them that they could not receive a fair trial in the District of Colorado, and that the trial court abused its discretion in denying their motions for change of venue.[12] There is, however, no evidence of any communal prejudgment of the instant case. And, as the court below pointed out (J. A. 13), "There is no affirmative evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror." It is a relevant consideration, moreover, that the evidence overwhelmingly proved petitioners' guilt on most counts.[13] Indeed, save for

[12] Petitioners made no motion for continuance on the ground that they were tried in a hostile atmosphere. Such motion was made on other grounds (R. 242, 243).

[13] The fact, upon which petitioners place some reliance (Pet. I, 33; Pet. II, 22), that several counts on which the jury returned a verdict of guilty were reversed by the court below for lack of evidence, "is not", as the court below held,

some reputation evidence on behalf of Calvaresi and Benallo, petitioners offered no evidence in their defense.

The claim that bias is to be imputed to an entire community requires a strong showing. *Stroble* v. *California,* 343 U. S. 181; *Dennis* v. *United States,* 339 U. S. 162, 168, 171–172; *Frazier* v. *United States,* 335 U. S. 497; *Shockley* v. *United States,* 166 F. 2d 704, 709–710 (C. A. 9), certiorari denied, 334 U. S. 850; see also *Finnegan* v. *United States,* 204 F. 2d 105, 110 (C. A. 8), certiorari denied, 346 U. S. 821; *Rakes* v. *United States,* 169 F. 2d 739, 746–747 (C. A. 4), certiorari denied, 335 U. S. 826. Prejudice sufficient to establish grounds for change of venue must be measured by its effect on jurors called to sit in judgment, and must be of sufficient intensity to preclude the attainment of "that fundamental fairness essential to the very concept of justice." *Stroble* v. *California, supra,* at 191–193; cf. *Holt* v. *United States,* 218 U. S. 245, 248; *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965. Unless the existence of such conditions is apparent, blanket allegations of bias are more properly reserved for examination on *voir dire,* at which time the attitudes and prejudgments of veniremen can be more accurately tested on full examination. *Colosacco* v. *United States,* 196 F. 2d 165, 168 (C. A. 10); cf. *Reynolds*

"sufficient in itself to convict a jury of bias and prejudice" (J. A. 13).

v. *United States,* 98 U. S. 145, 155–156; *Allen* v. *United States,* 4 F. 2d 688, 696–698 (C. A. 7); see *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2). Here the record shows painstaking care on the part of the trial court in the examination of the panel (R. 244–321).[14] Petitioners emphasize (Pet. I, 32; Pet. II, 23) that 22 of the 57 prospective jurors examined indicated that they had formed opinions with reference to the case. It does not follow that the selected jury was biased. Viewed in context, this circumstance reflects the care with which the jury was screened.

Petitioners rely heavily (Pet. I, 33; Pet. II, 24–25) upon *Delaney* v. *United States,* 199 F. 2d 107, 113 (C. A. 1), in which it was held that a careful *voir dire* examination could not properly screen out "preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." But that case is clearly distinguishable. There, the publicity was generated by Congressional committee hearings and had a direct relationship to the establishment in the public mind of the defendant's guilt. It was predicated upon investigative reports of the committee, a fact-finding body. The publicity in the instant case consisted of accounts of the pre-trial proceedings—proceedings which obviously involved no determinations as to the merits. If because of the noto-

[14] It is also significant that the selection of veniremen was not limited to the city of Denver, where the case was tried, but extended to a large portion of Colorado.

riety of the individuals involved, the publicity was greater than usually obtains in criminal cases, that alone did not warrant a change of venue. See *Shockley* v. *United States,* 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; cf. *United States* v. *Rosenberg,* 200 F. 2d 666, 668–669, (C. A. 2), certiorari denied, 345 U. S. 965.[15]

5. Petitioners Calvaresi and Benallo, relying on *Kotteakos* v. *United States,* 328 U. S. 750, assert (Pet. I, 21–23) that they were prejudiced by being tried with one another and with other defendants. The suggestion is that the evidence showed a number of separate conspiracies, each relating to a separate episode of jury tampering; that there was insufficient proof to establish that Calvaresi and Benallo were parties to any general conspiracy; and that joinder of indictments was improper since the offenses in question did not involve the same acts or transactions or a common scheme or plan. It is also suggested that, at a minimum, there were two conspiracies, one relating to the effort to influence the June panel and the other to influence the September panel; that it is, indeed, inconceivable that conspirators undertaking to corrupt the June panel would an-

[15] The claim of petitioners Calvaresi and Benallo (Pet. I, 31), that this Court's ruling in *Shepherd* v. *Florida,* 341 U. S. 50, is applicable to the instant case, is without merit. There was evidence, in that case, of actual terrorism extending to the court room so as to deny the defendants their rights to due process. This is not such a case.

ticipate a mistrial and plan, *ab initio* to influence a subsequent panel; and that there is nothing to connect those petitioners with the June conspiracy.

As the Court of Appeals held, the evidence abundantly established a general, overall plan which had as its single and consistent purpose the procurement of Eugene Smaldone's acquittal in his criminal tax case. The evidence showed further that Calvaresi and Benallo separately importuned Mrs. Alsup for this very purpose. It is also inferable that these petitioners knew that the Smaldones were enlisting other persons to further the object in view by importuning other jurors. They were aware that there was no assurance that Mrs. Alsup would actually sit on the Smaldone tax case and that the chances of procuring an acquittal bore a direct ratio to the number of persons on the panel who would be prepared to abandon their obligations. In fact, Calvaresi advised Mrs. Alsup that if she did not accept the proffered bribe someone else would get it.

It is plain, in short, that there was a common, informed purpose in the various efforts to influence the individual jurors and that these efforts were part and parcel of the same continuing scheme. The situation is thus markedly different from that involved in *Kotteakos* and closely akin to that presented by *Blumenthal* v. *United States,* 332 U. S. 539. As this Court

stated in the latter case (p. 557), "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."

The argument that, at the least, there must have been two independent conspiracies has no substance. It is immaterial whether those who planned to influence the June panel foresaw the possibility of a mistrial (an eventuality, it may be noted parenthetically, hardly remote). The short answer is that the ultimate and unchanging object of the scheme—Smaldone's acquittal—had not been realized when the mistrial occurred. There is no evidence that the scheme was abandoned at that point and there is affirmative evidence (the legal presumption of continuity aside) that it continued. The fact that the bribery efforts of Calvaresi and Benallo were directed to a member of the September panel is likewise immaterial. One who enters a continuing conspiracy cannot evade responsibility for acts occurring prior to his entry.

Another contention based on allegedly improper joinder is raised by petitioners Eugene

and Clyde Smaldone (Pet. II, 17–21). Although their conviction on the conspiracy charges for which they were tried was reversed (on the ground that the indictment charged the same offenses as the conspiracy indictment to which they pleaded guilty), they urge that they did not receive a fair trial because evidence which would have been inadmissible on the substantive counts was admitted on the conspiracy counts. However, since Calvaresi and Benallo were properly tried for conspiracy, all evidence relating to the conspiracy was properly introduced. The conviction of the Smaldones on the substantive counts had to be based on the evidence relating to those specific counts.[16] Moreover, the substantive counts were based on the same overt acts involved in the conspiracy counts, and the evidence showed such direct participation of the Smaldones in so many overt acts that any slight additional evidence relating to co-conspirators which might have been admitted against them must have been cumulative. There is thus no showing of prejudice.

6. Petitioners argue, for the first time in this Court (Pet. I, 18–20; Pet. II, 30–32), that, since the Government proved but one overall conspiracy, consecutive sentences could not be imposed on the basis of each of the two counts of the

[16] Petitioners were apparently satisfied with the charge, which is not included in the record. Presumably, therefore, it correctly charged as to the evidence tending to prove the substantive offenses.

conspiracy indictment. We concede that this contention is sound. *Braverman* v. *United States,* 317 U. S. 49, 53. As to Calvaresi and Benallo, however, the question is academic. They received suspended sentences on both counts of the conspiracy indictment; they were not placed on probation in consequence of such suspension; and the sentences were made to run concurrently with the sentences on the substantive counts. See *Pinkerton* v. *United States,* 328 U. S. 640, 641–642.

Eugene and Clyde Smaldone, on their pleas of guilty to the two counts of conspiracy indictment No. 13833, were sentenced to consecutive terms. Since the counts to which they pleaded guilty charged, on their face, two offenses, the nature of the evidence to support the conviction based on that pleading would not normally be open for review. See *Harlan* v. *McGourin,* 218 U. S. 442; *Eury* v. *Huff,* 146 F. 2d 17 (C. A. D. C.). But in view of the fact that the court below found the indictment in No. 13800 to cover the same matters as the indictment in No. 13833, and the proof under No. 13800 established only one offense, we agree that one of the five-year sentences resting on conspiracy indictment No. 13833 should be vacated. We believe, however, that relief should properly be sought by way of a motion in the District Court under Rule 35, F. R. Crim. P., to correct sentence rather than on the petition for certiorari, since petitioners failed to

make a motion at the time of their plea that the Government elect upon which count to proceed and since they failed to raise the issue in the District Court or in the Court of Appeals.[17] [18]

CONCLUSION

The sentences imposed upon the petitioners in these cases were undeniably severe. Justice in criminal cases depends not only upon the fairness of procedures during the trial but upon the reasonableness of the sentence imposed in the event of conviction. It is unfortunate when sentences in a serious case have not received, together with the other aspects of the case, the benefit of independent examination by an appellate tribunal.

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[17] The same procedure should be followed in correcting the error (which we concede) asserted by petitioner Clyde Smaldone at Pet. II, p. 17, note 9.

[18] The contention of petitioners Eugene and Clyde Smaldone (Pet. II, 35–39) that the sentencing judge had no power to impose sentences upon them under indictment No. 13833 because another judge of the court took their guilty pleas thereto is frivolous. Both judges were members of the same court with coordinate and concurrent jurisdiction. Thus, either one had the power to impose the sentence. *Owens* v. *Hunter*, 169 F. 2d 971, 972 (C. A. 10). Petitioners themselves admit (Pet. II, 37) that their sentences were not void. Nor do they claim that they were in any way prejudiced by such sentencing. Although, ordinarily, within the spirit of Rule 25, F. R. Crim. P., the judge who accepts the plea of guilty should also impose the sentence, the instant situation was not ordinary—conspiracy indictment No. 13833 was based upon the same transactions involved in all the other indictments upon which sentences were to be pronounced, and, furthermore, the sentencing judge was requested by the other judge to impose the sentence (R. 485).

The absence of authority for appellate review of sentences is a weakness in our jurisprudence.

But this Court cannot assume that the sentences here are, under the circumstances, excessive. If the question were reviewable, the record would doubtless reflect what is not now in the record, namely, the detailed reasons brought to the attention of the trial court which led to the imposition of the sentences. The factual context of the case was fully developed before the sentencing judge; it is not before this Court.

In any event, this Court has indicated that federal appellate tribunals cannot review sentences which are within the statutory limits. As Judge Learned Hand, expressing the prevailing view of the law, observed in a case in which he believed that the sentencing power had been unwisely exercised, "We are not ourselves able to intervene, though if we could, we should not hesitate to do so." *Nash* v. *United States,* 54 F. 2d 1006, 1008 (C. A. 2). In our view, no other aspect of the instant case warrants the Court's intervention.

Respectfully submitted,

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No. 538. CALVARESI ET AL. *v.* UNITED STATES; and

No. 548. SMALDONE ET AL. *v.* UNITED STATES. On petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge. *A. X. Erickson, W. H. Erickson* and *Albert E. Sherlock* for petitioners in No. 538. *Peyton Ford, Alan Y. Cole* and *F. E. Dickerson* for petitioners in No. 548. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 216 F. 2d 891.